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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,
Appellants,

v.

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,
Appellees.

On Appeal From a Three-Judge United States District Court For the District of Connecticut

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BRIEF OF APPELLEE COLLEGES AND UNIVERSITIES

OPINION BELOW

The opinion of the United States District Court for the District of Connecticut is reported at 312 F. Supp. 1191 (1970). It is reprinted in full starting at page 37 of the Joint Appendix (J.A.).

JURISDICTION

The District Court entered judgment in this case on March 19, 1970. J.A. 68. Notice of appeal was filed with the District Court on April 8, 1970. J.A. 68. This Court noted probable jurisdiction on June 22, 1970. 399 U.S. 904. The jurisdiction of this Court to hear this case on direct appeal rests on 28 U.S.C. § 1253. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

Appellants draw into question the constitutionality of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58 (1964). Most of the relevant provisions of that statute are reprinted as an Appendix to appellants' brief.

QUESTIONS PRESENTED

1. Whether the Higher Education Facilities Act of 1963 can be construed in a manner that would exclude from the Act's Title I grant program otherwise eligible institutions of higher education solely because such institutions are church-related.

2. If the Act cannot be so construed, whether the inclusion of church-related colleges and universities in a major federal program designed to expand educational opportunities is contrary to the Establishment and Free Exercise Clauses of the First Amendment.

STATEMENT OF THE CASE

A. THE CHALLENGED STATUTE

In the early 1960s, the Nation's colleges and universities faced an acute crisis of over-crowding as more and more young Americans sought the advantages of higher education. Congress responded to that crisis by enacting the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58. In transmitting to Congress his legislative proposals that were incorporated in that statute, President Kennedy succinctly summarized the problems confronted by institutions of higher education:

> "The long-predicted crisis in higher education facilities is now at hand. For the next 15 years, even without additional student aid, enrollment increases in colleges will average 340,000 each year. If we are to accommodate the projected enrollment of more than 7 million college students by 1970—a doubling during the decade—$23 billion of new facilities will be needed, more than three times the quantity built during the preceding decade. This means that, unless we are to deny higher education opportunities to our youth, American colleges and universities must expand their academic facilities at a rate much faster than their present resources will permit." H.R. Doc. No. 54, 88th Cong., 1st Sess. 7 (1963).

The concerns expressed by President Kennedy were repeatedly echoed in the congressional hearings on his legislative proposals for higher education and in the floor debates which preceded the passage of the Higher Education Facilities Act.[1] A consistent theme of those

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[1] See generally, *Hearings on H.R. 3000 Before the House Comm. on Education and Labor*, 88th Cong., 1st Sess. (1963); *Hearings on S. 500 Before the Education Subcomm. of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. (1963); *Hearings*

hearings and debates was that, without a substantial infusion of federal aid, the Nation's colleges and universities would simply be unable to undertake the needed expansion of their facilities.[2]

The Higher Education Facilities Act seeks to assist institutions of higher education to expand their enrollment capacities by providing grants and loans for the construction of academic facilities. The appellants have challenged only Title I of the Act, which authorizes grants of federal funds to public and private colleges and universities to finance, in part, the construction of undergraduate academic facilities. 20 U.S.C. §§ 711-21. The critical showing that must be made by a college or university seeking a Title I grant is that the facilitiy to be constructed with the grant "will . . . result in an urgently needed substantial expansion of the institution's student enrollment capacity, capacity to provide needed health care to students or personnel of the institution, or capacity to carry out extension or continuing education programs." 20 U.S.C. § 716.

The Title I grant program is administered jointly by the federal and state governments. To enable its institutions of higher education to participate in that program, a state is required to establish an agency to carry out the state's administrative functions under the Act. 20 U.S.C. § 715. The most important of those

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on S. 580 Before the Education Subcomm. of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. (1963); 109 Cong. Rec. 14941-94, 19215-20, 19373-405, 19467-500, 19877-92, 21123-36, 24053-69 (1963).

[2] See, *e.g.*, *Hearings on H.R. 3000, supra*, at 533-40 (statement and testimony of Dr. Mason W. Gross, President of Rutgers University); *id.* at 749, 753-54 (testimony of Dr. Fred H. Harrington, President of the University of Wisconsin).

functions are to screen applications for grants from colleges and universities and to establish relative priorities among eligible projects to assure that available federal funds will have a maximum impact on increasing enrollment capacity. 20 U.S.C. §§ 715, 717.[3] Projects approved by the state agencies are forwarded to the United States Office of Education for further review to assure compliance with all requirements of the statute and the regulations promulgated thereunder. See Findings of Fact ¶¶ 21-25, J.A. 60-61.

Title IV of the challenged statute limits Title I grants in ways directly relevant to the appellants' claims. Eligible institutions of higher education are defined in a religiously neutral manner. The statute requires such institutions to be, *inter alia,* nonprofit, legally authorized by the state in which they are located to provide a program of education beyond high school, and accredited. 20 U.S.C. § 751(f). The statute also excludes

> "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which (although not a facility described in the preceding clause) is used or to be used primarily in connection with any part of the program of a school or department of divinity. . . ." 20 U.S.C. § 751(a)(2).

Finally, the statute gives the federal government a twenty-year interest in all academic facilities funded under the Act, and it authorizes the government to

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[3] The four appellee colleges and universities are located in Connecticut and, consequently, the evidence at trial relating to the administration of the challenged statute focused on the procedures followed by the Connecticut Commission on Aid to Higher Education. See Findings of Fact ¶¶ 13-20, J.A. 58-60.

recover a prorated share of the value of any facility which is used for a prohibited religious purpose, as defined by § 751(a)(2), during the twenty-year period. 20 U.S.C. § 754.

B. THE PROCEEDINGS BELOW

The appellants, fifteen federal taxpayers, filed their complaint with the United States District Court for the District of Connecticut on September 25, 1968, asserting the basic claims they now ask this Court to review —namely, that the challenged statute does not authorize grants of federal funds to church-related colleges and universities and that, if such grants are authorized, Title I to that extent contravenes the Establishment and Free Exercise Clauses of the First Amendment. The named defendants, and the appellees herein, were four Catholic colleges and universities in Connecticut that have been the recipients of a total of five Title I grants[4] and the federal and state officials responsible for administering those grants. The four institutions are Fairfield University, Sacred Heart University, Albertus Magnus College and Annhurst College.

A three-judge court was convened, as requested by the appellants, and all of the factual issues in the case were fully tried before that court. A total of 155 documentary exhibits were admitted in evidence, and testimony was taken from 22 witnesses. The appellants' evidence consisted entirely of documents obtained from the various appellees through pre-trial discovery

[4] Fairfield University received Title I grants for the construction of a library and a science building; Sacred Heart University received a Title I grant for the construction of a library; Annhurst College received a Title I grant for the construction of a fine arts building; and Albertus Magnus College received a Title I grant for the construction of a language laboratory.

and stipulations of fact entered into with the appellees. The appellants' central legal theory was that the Establishment Clause prohibited the granting of federal funds to so-called "sectarian" educational institutions, and their evidence focused on the alleged "sectarian" nature of the four appellee institutions. As a standard of sectarianism, the appellants relied on the criteria devised by the Maryland Court of Appeals in *Horace Mann League* v. *Board of Public Works,* 242 Md. 645, 220 A.2d 51, *cert. denied, appeal dismissed* 385 U.S. 97 (1966).

The legal theory of the appellee colleges and universities had a far different focus. Relying principally on *Board of Education* v. *Allen,* 392 U.S. 236 (1968), the appellee institutions contended that the Establishment Clause issue turned on the nature of the educational function being subsidized by the federal funds, and not the religious or nonreligious nature of the institution receiving those funds. For that reason, the appellees objected to all evidence offered by the appellants to show the alleged "sectarian" nature of those schools, Trial Transcript 142-50, 161-62, and a principal thrust of the evidence offered by the appellee institutions was that the academic facilities funded with the federal money at their campuses were being used or would be used for strictly secular purposes. See J.A. 101-21. In addition, the appellee institutions presented rebuttal evidence through testimony to correct the distorted picture the appellants attempted to draw of those schools through documentary evidence.

After post-trial briefing and extended post-trial arguments, the District Court ruled unanimously that the challenged statute and the Title I grants received by the appellee institutions did not contravene the Es-

tablishment and Free Exercise Clauses. The District Court faithfully followed and applied the controlling constitutional principles articulated by this Court's decisions. The District Court first ruled that church-related institutions of higher learning were not excluded from receiving Title I grants because of their church relationships, as long as they satisfied the religiously neutral criteria for eligibility under the statute. It then held that the purpose and primary effect test prescribed by *Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968), governed appellants' Establishment Clause claim. In applying that test, the District Court examined only the educational function being subsidized by the federal funds and found that function to be wholly secular. Not only did the District Court reject the appellants' invitation to decide the Establishment Clause issue according to the so-called "sectarian" nature of the appellee institutions, but it also declined to enter the findings of fact sought by appellants concerning the character or nature of those schools. Finally, the District Court relied expressly on *Board of Education* v. *Allen,* 392 U.S. 236, 248-49 (1968), in finding no merit in appellants' Free Exercise claim.

SUMMARY OF ARGUMENT

I.

Appellants' suggestion that the Higher Education Facilities Act be construed to exclude church-related colleges and universities from participation in the Title I grant program is at odds with the Act's legislative history and this Court's decisions. The hearings and debates that preceded enactment of the statute demonstrate that grants to church-related institutions were clearly contemplated by Congress. In fact, the Senate defeated two amendments that would have ex-

cluded all church-related schools from participation in the Title I grant program.

A statute can be construed to avoid constitutional questions only if such a construction is "fairly possible." The construction of the contested statute is not fairly possible because it would require a substantial rewriting of the legislation. Appellants are, in effect, seeking to amend the Act through the judicial process in a manner that Congress rejected in the legislative process. Thus, the Court must reach and decide the constitutional question raised by appellants in this litigation.

II.

The essential defect in appellants' Establishment Clause argument is its factual underpinnings. Appellants seek to place this case in a procedural posture that bears no relationship to the course of litigation pursued by the parties. The purpose of that distortion is to urge this Court to disregard the extensive factual record developed in this case and to ground a rule of constitutional law on appellants' assumptions about church-related education in this country. But those assumptions find no support in the record of this case or in the realities of present day church-related education. In effect, appellants want to strip this case of its factual context and to obtain an advisory opinion on hypothetical and abstract questions.

The central concern of the Establishment Clause is that government be neutral in matters touching upon religion. While the constitutional goal is separation of church and state, absolute separation is neither required nor practical. The problem is necessarily one of degree, and the degree of separation demanded is

defined by the requirement of government neutrality. The principle of neutrality at once recognizes the inevitability of contacts and interaction between government and religion in modern society and reconciles the overlapping, and occasionally competing, dictates of the Establishment and Free Exercise Clauses.

The requirement of government neutrality in religious matters is fully implemented by the purpose and primary effect test enunciated in *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963), and subsequently applied in *Board of Education* v. *Allen,* 392 U.S. 236 (1968), to the precise question of public financial assistance to church-related education. Under that test, a challenged statute will survive Establishment Clause scrutiny if it has a secular purpose and a primary effect that neither advances nor inhibits religion. A statute having the requisite purpose and primary effect will not fall simply because church-related institutions participate in its program and derive tangible benefits from it.

The decisions in *Allen* and *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), provide precise guidance for applying the purpose and primary effect test to public spending programs for education in which church-related schools participate. A challenged statute's purpose is to be adjudged according to any statement of legislative purpose it contains, and a statute's effects are to be evaluated according to their relationship to the stated purpose. The principal focus of the primary effect inquiry is the nature of the educational functions subsidized by public funds—not the religious or nonreligious nature of schools receiving those funds. If the government supports only the secular educational functions of participating church-related schools, the

statute will not have the primary effect of *advancing* religion. And if the statute's administrative scheme does not produce excessive or impermissible involvement with religion, the spending program will not have the primary effect of *inhibiting* religion.

Those governing constitutional principles lead inescapably to the conclusion that the Higher Education Facilities Act is in harmony with the Establishment Clause. The stated purpose is demonstrably secular. Funds received by church-related schools under the Act support only their secular educational functions. And the necessary administrative relationships between public officials and church-related schools are carefully tailored to assure a proper and constitutional use of public funds and to avoid government involvement in the religious functions of those schools. Consequently, the contested statute has a secular purpose and a primary effect that neither advances nor inhibits religion.

Appellants contend that the Establishment Clause imposes an absolute constitutional bar to any public assistance to so-called "sectarian" schools. They derive that supposed constitutional rule from a single sentence in *Everson* v. *Board of Education,* 330 U.S. 1 (1947). But the *Everson* language relied on by appellants was not intended by this Court as a definitive and final test of Establishment Clause limitations on government power. The prohibition on all aid to church-related institutions that appellants derive from *Everson* is in direct conflict with this Court's decision in *Bradfield* v. *Roberts,* 175 U.S. 291 (1899). Appellants also propose the "child benefit" theory as the limit of government power to aid church-related education. But that theory elevates the form of legislation over its substance and finds no support in the cases.

Appellants suggest that they can prevail under the purpose and primary effect test. Their argument however, is based on a misapplication of that test. They would have the Court adjudge the constitutionality of the challenged statute by examining the purpose and primary effect of *recipient schools.* But the cases clearly limit the Court's inquiry to the purpose and primary effect of *the statute.*

III.

Appellants further contend that the Higher Education Facilities Act violates the Free Exercise Clause because it amounts to "compulsory taxation for religious purposes." That contention is palpably lacking in merit. First, appellants have failed to show how the challenged statute coerces them in the exercise of their religious beliefs, a necessary factual predicate to a valid Free Exercise claim. Secondly, expenditures under the Act are for strictly secular purposes and there is no governmental action for religious purposes, as appellants claim.

ARGUMENT

I.

ISSUE OF STATUTORY CONSTRUCTION

Appellants' threshhold position is that Congress did not authorize the payment of federal funds to church-related[5] colleges and universities under the Higher

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[5] A problem of semantics runs throughout the appellants' brief in this Court. Appellants claim they are not seeking to disqualify all church-related colleges and universities from receiving federal funds. Rather they purport to be seeking a declaration only that certain "sectarian" educational institutions, as appellants define that term, should be denied participation in general public spending programs for education. But the distinction that appellants seek to draw between church-related and so-called "sectarian"

Education Facilities Act,[8] and the appellants urge this Court to construe the statute in that manner to avoid reaching the constitutional issues they have raised. Appellants invoke the salutary principle that, whenever possible, this Court should avoid ruling on the constitutionality of acts of Congress and should resolve disputes concerning such legislation through the device of statutory construction. However, neither the legislative history of the Higher Education Facilities Act nor the decisions of this Court will permit the statutory construction urged by appellants.

As appellants point out, the question of whether church-related colleges and universities should partici-

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institutions is illusory. As this brief will demonstrate, see pp. 22-25, *infra*, appellants' concept of a "sectarian" educational institution is so ill-defined and vague that administrative or judicial application of that concept will result in confusion and chaos whenever educational institutions which profess a church relationship seek federal funds under the challenged statute. *Cf. Flast* v. *Cohen*, 392 U.S. 83, 89-90 (1968). As a result, under the constitutional standard urged by appellants, any college or university claiming a church relationship will always be in doubt concerning its eligibility for public funds. For that reason, the appellee colleges and universities can find no meaningful distinction between the terms "sectarian" and church-related, and this brief, as did the court below, will refer to those institutions whose constitutional eligibility for public funds has been challenged by appellants as "church-related."

[8] The basis for appellants' statutory construction contention has shifted as the case has developed. In their complaint, appellants flatly asserted that Congress did not intend to include church-related colleges and universities within the class of eligible institutions. Complaint ¶ 25, J.A. 12, 33. At trial, appellants contended that Congress "sought to fudge the issue" of inclusion of church-related institutions and left the question for the courts to decide. Trial Transcript 9. Now appellants ask this Court to infer an exclusion of church-related colleges and universities from the statute's benefits because the statute does not expressly authorize their participation.

pate in a federal program of assistance to higher education was considered and debated at great length in Congress. Both the policy considerations[7] and the constitutional implications of that question were presented to the congressional committees which held hearings on the legislation[8] and were explored exhaustively in the ensuing floor debates.[9] Indeed, the issue of whether church-related schools should be included in federal education legislation long proved to be a stumbling block to the enactment of such legislation.[10]

Against that background, the floor debates that preceded enactment of the Higher Education Facilities Act are particularly illuminating on the question of whether the statute authorized grants to church-related institutions of higher education. Those who spoke during the debates—proponents and opponents in both the House and the Senate—uniformly assumed that the legisla-

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[7] Those policy considerations included whether limited federal funds for education should be allocated to private, as well as public, institutions and whether assistance to church-related institutions, even though constitutionally permissible, would be wise. How wisely Congress resolved those policy considerations is not at issue in this appeal. The issues before this Court are strictly limited to questions of constitutional power, or more accurately, the constitutional limitations imposed on the conceded power of Congress to tax and spend for the general welfare. This Court is not concerned with whether Congress acted wisely in resolving certain policy disputes which, under our tripartite national government, have been committed solely to Congress for resolution.

[8] See, *e.g.*, *Hearings on H.R. 3000*, *supra* note 1, at 91, 112-15 (testimony of Anthony J. Celebreeze, Secretary of Health, Education and Welfare); *id.* at 392-97 (testimony of Dr. Edgar Fuller).

[9] See, *e.g.*, 109 Cong. Rec. 14944-94, 19399-401, 19467-84 (1963).

[10] See, *e.g.*, L. Pfeffer, Church, State and Freedom 571-96 (2d ed. 1967); P. Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 Land & Water L. Rev. 475 (1966).

tion, as it emerged from the committees of both houses, authorized participation of church-related colleges and universities in the grant and loan programs. The issue that was debated was whether such authorization was wise and/or constitutional.[11] For those who doubted that the statute contained such authorization, a simple question was all that was necessary. Consider the following colloquy during the debate in the House of Representatives:

> "Mr. Poage. . . . I would like to ask the gentleman as to a question of fact because he is on the committee and has studied the bill. The bill does give authority to make grants to church-related institutions, does it not?
>
> "Mr. Quie. That is correct.
>
> "Mr. Poage. I thank the gentleman.
>
> "Mr. Quie. That is correct; any institution of higher education, whether it is private, nonchurch related, church related or public, can qualify if it provides for increases in enrollment and is needed and it is determined by the State commission it has the priority of needs so that it does qualify and that it will be able to build its facilities within that Federal share which cannot be more than one-third of the total cost and that its construction will be economical and that they do not want to use the building for purposes where the general public is charged admission, not for a gymnasium or recreational purposes or to be used for sectarian instruction or religious worship or a school of divinity. As I explained before, it had to fit into these criteria in order to qualify." 109 Cong. Rec. 14963 (1963).

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[11] See, *e.g.*, 109 Cong. Rec. 14945 (1963) (remarks of Rep. Anderson); *id.* at 14976 (remarks of Rep. Goodell); *id.* at 19467-77 (remarks of Senator Ervin); *id.* at 19879-80 (remarks of Senator Javits).

The committee chairmen and floor managers responsible for guiding the statute to enactment repeatedly defended the inclusion of church-related institutions as being consistent with constitutional limitations on congressional power.[12] Such defenses of the legislation would have been wholly unnecessary if grants of federal funds to church-related colleges and universities had not been authorized by the Act.

Finally, the Senate considered and defeated resoundingly two amendments offered by Senator Ervin to achieve the result appellants now seek—namely, the express exclusion from the statute's grant and loan program of all "church owned, controlled and operated colleges."[13] The debate on the Ervin amendments clearly reflects the Senate's awareness that church-related institutions would participate in the benefits of the statute as enacted.

The legislative history outlined above is directly relevant to appellants' statutory construction argument. For, when recourse to legislative history is necessary for purposes of statutory construction, this Court has consistently viewed the statements of an act's sponsors or promoters as valuable aids in construing the act. See, *e.g.*, *Galvan* v. *Press*, 347 U.S. 522, 526-28 (1954); *United States* v. *United Mine Workers*, 330 U.S. 258, 278-81 (1947); *Richbourg Motor Co.* v. *United States*, 281 U.S. 528, 536 (1930). The cases also hold that a statute cannot be construed in a manner that would achieve a result rejected by Congress by defeating amendments designed to achieve that result. See, *e.g.*,

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[12] See, *e.g.*, 109 Cong. Rec. 14954 (1963) (remarks of Rep. Powell); *id.* at 19218 (remarks of Senator Morse).

[13] 109 Cong. Rec. 19492-96 (1963).

Blau v. *Lehman*, 368 U.S. 403, 410-13 (1962); *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, 508-09 (1945); see also *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 94 (1935).

Despite these established principles of construction, appellants continue to urge this Court to construe the Higher Education Facilities Act in a manner that would exclude church-related colleges and universities from the benefits of the Title I grant program. Recognizing that their argument flies in the face of the statute's legislative history, appellants can support their position only by noting that the statute contains no express authorization for grants to church-related institutions. But, as the court below noted, the limitations imposed by the Act on the uses that can be made of Title I facilities, see 20 U.S.C. § 751(a)(2), "make it plain that grants for construction of academic facilities ... [at] church-related colleges and universities were contemplated." J.A. 43.

Having debated at length whether church-related colleges and universities should participate in the statutory program and having decided in favor of such participation, Congress chose to define eligible institutions in a religiously neutral manner. 20 U.S.C. § 751(f). However, Congress carefully defined academic facilities eligible for federal financing to prevent any use of such facilities at chuch-related institutions for religious worship and sectarian instruction. 20 U.S.C. § 751(a)(2). In so writing the challenged statute, Congress sought to achieve a maximum expansion of academic facilities at the Nation's colleges and universities while scrupulously avoiding any use of federal funds to advance or inhibit religion. To require an express statutory authorization for inclusion of church-related

institutions is to quibble over the mechanics of legislative draftsmanship and to ignore the actual statutory scheme and its extensive legislative history.

Appellants also invoke the familiar rule that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916). In view of the legislative history and express wording of the Higher Eductaion Facilities Act, however, appellants' proposed construction of the statute is not "fairly possible." As the Court observed in *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933), after quoting the principle relied on by appellants: "[A]voidance of a difficulty will not be pressed to the point of disengenuous evasion."

More pertinent to this case is the settled principle that a statute cannot be construed to avoid constitutional issues if such construction would result in a "substantial rewriting" of the statute. *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964); *United States* v. *Robel*, 389 U.S. 258, 262 (1967). The best statement of that principle is found in *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 518 (1926):

> "We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within fundamental law. But it is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation."

For this Court to construe the Higher Education Facilities Act to exclude so-called "sectarian" colleges and universities from the benefits of Title I would in-

deed be substituting amendment for construction. And the amendment that would be substituted would be one that Congress specifically declined to adopt. If, as a result of rejecting the statutory construction urged by appellants, this Court must reach and decide the constitutional question presented by appellants, the Court will merely be exercising its traditional and necessary judicial function. For the task of deciding constitutional questions is "inescapably" committed to this Court when those questions arise in the context of a proper case or controversy. *Trop* v. *Dulles,* 356 U.S. 86, 103-04 (1958). That task cannot be avoided by engaging in an exercise of legislative power under the guise of statutory construction.

II.

ESTABLISHMENT CLAUSE ISSUE

The essential legal dispute between appellants and appellees in this action can be simply stated. Appellants insist that the Establishment Clause validity of general public spending programs for education should be decided according to the religious or non-religious character of schools participating in such programs. The several appellees contend that the controlling question is whether the government has sought to aid and has in fact aided only secular educational functions, irrespective of the religious character of schools performing those functions.

Appellants derive the constitutional test they propose from a single sentence in one of this Court's decisions. They also urge that their proposed test be applied to an abstract and wholly hypothetical set of facts. This brief will examine the erroneous factual assumptions of appellants' argument, then trace the development of the controlling constitutional standard through this

Court's several Establishment Clause decisions, and finally demonstrate that appellants' proposed test conflicts with the decided cases and core Establishment Clause values.

A. Posture of the Controversy

The essential underpinnings of appellants' Establishment Clause argument are contained in six pages of their brief which purport to portray the posture of the present controversy. Appellants' Brief, pp. 6-11. In that portion of their argument, appellants place the case in a procedural posture that bears no resemblance to the course of litigation that brought the controversy to this Court. A more fundamental difficulty with appellants' argument is that it invites this Court to decide the important constitutional issues in the case as abstract and hypothetical questions.

Appellants assert that this controversy reaches the Court "in practical effect as a motion to dismiss." Appellants' Brief, p. 11. The proceedings in this case to date and the opinion and findings of fact entered by the court below belie that contention. Appellants' complaint contains the critical factual allegations that underlie their Establishment Clause argument—namely, that the appellee colleges and universities are "sectarian" institutions which are constitutionally ineligible to receive public funds. Complaint ¶¶ 12-16, 29; J.A. 10-11, 13. The answer filed by the appellee colleges and universities specifically denied those allegations. J.A. 16-18.[14] Appellants also undertook extensive pre-trial discovery. The appellee colleges and

[14] The answer of the Federal Government also denied those allegations. J.A. 21-22. The State of Connecticut pleaded lack of information and knowledge and insisted that appellants prove their allegations of sectarianism. J.A. 26-27.

universities were required to produce more than 200 documents, and the president of each of the appellee institutions was deposed. The trial of this action consumed four days. A total of 155 documents was placed in evidence, and the three-judge court heard testimony from twenty-two witnesses. Appellants presented only documentary evidence, and, through that evidence, they attempted to prove that the appellee institutions were "sectarian." The evidence of the appellee colleges and universities showed the non-religious use they made of their Title I facilities and established that they were not "sectarian" in the sense that appellants define that term.

The essential legal dispute that emerged from the trial was whether the Establishment Clause issue was to be decided according to the nature of the educational function subsidized by federal funds or according to the nature of the institutions receiving those funds. The court below agreed with the appellees that the nature of the educational function subsidized was controlling. See J.A. 49. As a consequence, the court below ultimately viewed appellants' evidence pertaining to the alleged sectarian nature of the appellee schools as irrelevant to the controlling constitutional test.[15]

The court below, however, did not disregard all of the evidence presented at trial. Its findings of fact relied heavily on evidence offered by appellants to show the regulatory scheme of the challenged statute[16]

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[15] Significantly, however, the District Court rebuffed all efforts by the appellee colleges and universities to exclude appellants' evidence concerning their alleged sectarian nature. Thus, with a few exceptions, all such proof offered by appellants is a part of the record of this case.

[16] PX 125, 126, 127.

and on the proof presented by the appellee schools to show that their Title I facilities would be used for non-religious purposes.[17] See J.A. 58-66. And those findings of fact were critical to the District Court's conclusion that the Higher Education Facilities Act, in its purpose and primary effect, neither advanced nor inhibited religion. No case could bear less resemblance to one disposed of on a motion to dismiss.

In attempting to depict this case in the posture of a motion to dismiss, appellants are really asking this Court to disregard the extensive factual record developed in the court below. It is understandable that appellants should now employ that tactic. Appellants specifically alleged that the appellee institutions were "sectarian" and, by their own concession, their proof at trial failed to establish that those schools are of such a character.[18] They try to mask that failing now by brushing aside the appellee schools as unimportant appendages to this litigation. Appellants' Brief, pp. 7-8.[19] But, in the process, appellants seek to deprive the case of its only valid factual context if the adversary process is to have any relevance to constitutional adjudication.

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[17] J.A. 101-21.

[18] The evidence presented at trial concerning the nature of the appellee institutions was reviewed fully by those schools in the proposed findings of fact that they submitted to the court below. That portion of those proposed findings is reprinted as an Appendix to this brief to summarize for the Court the evidence presented on that issue.

[19] Appellants have gone to extreme lengths to shift the attention of this Court away from the appellee colleges and universities. For example, the documentary evidence presented at trial included several catalogs of the appellee schools. Yet, when appellants wish to reinforce a point by quoting from a catalog of a church-related college, they use the catalog of Wheaton College in Illinois, which is no part of the record of this case. Appellants' Brief, pp. 39-40.

Appellants base their Establishment Clause argument not on the facts developed at trial about these four schools, but on a so-called "composite profile" [20] of a "sectarian" college. According to appellants, such a college is one

> "which admits only students of a particular religion, requires them to participate in religious activities, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church, requires them under penalty of dismissal to take instruction in the theology and doctrines of religion, and does everything to propagate and advance a particular religion other than confer degrees in divinity . . . ." Appellants' Brief, pp. 10-11.

Conceding that no such institution is reflected in the record of this case, appellants nevertheless contend that "we have no doubt there are many such [sectarian colleges] throughout the nation," Appellants' Brief, p. 11.

It is true, as they assert, that appellants could have brought this suit in any state in the country. But one wonders why they did not, therefore, bring the action in a state or judicial district containing a college or university fitting their composite profile. Presumably when this case was filed appellants expected to be able to prove that the appellee colleges and universities matched that profile. But appellants, by their own concession, failed in that undertaking. What guarantee does the Court have, other than appellants' glib assurances, that they or others will be any more successful in the future in locating such a "sectarian" college or university? Until such proof is presented in the context of an adversary proceeding, the only proper

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[20] Appellants' Brief, p. 26.

assumption that this Court can make is that appellants' so-called "composite profile" of a "sectarian" college is a stereotype that exists only in appellants' fertile imagination.

For this Court to decide the important Establishment Clause issue in this case on the basis of appellants' "composite profile" would be to decide an abstract and hypothetical question.[21] In effect, appellants are asking this Court for an advisory opinion that, if there should be a college fitting their "composite profile," that instiution would be ineligible for public financial assistance.[22] The case and controversy doctrine of Article III prohibits such exercises of judicial power by this Court. In addition, by urging this Court to disregard the record of this case, appellants are seeking to strip it of the very factual context which the Court considers crucial to a proper resolution of important and difficult constitutional questions. See, *e.g., W. E. DuBois Clubs* v. *Clark,* 389 U.S. 309, 312 (1968).

A further difficulty with appellants' argument is that, while contending that a school may be constitutionally ineligible for public funds even if it has less than all of the elements of their "composite profile," Appellants' Brief, p. 11, they neglect to say how much less it may have. How, then, would they have this Court

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[21] Cases based on abstract and hypothetical questions raise serious problems of justiciability under Article III. See *Flast* v. *Cohen,* 392 U.S. 83, 99-100 (1968); *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227, 240 (1937).

[22] "[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." C. Wright, Federal Courts 34 (1963).

draw the parameters of sectarianism to guide judges, legislators and administrators of public aid programs in the future on this important public issue? Appellants do make reference to *Horace Mann League* v. *Board of Public Works,* 242 Md. 645, 220 A. 2d 51, *cert. denied, appeal dismissed,* 385 U.S. 97 (1966), as purporting to set down some criteria for determining whether colleges receiving state aid were "legally sectarian." However, as the court below noted, the reasoning and rationale of the *Horce Mann* decision are in direct conflict with this Court's Establishment Clause decisions.[23] J.A. 49, n. 14. Surely such a discredited case cannot be the vehicle for fashioning a rule of constitutional law.

Thus appellants ask this Court to create a rule of constitutional law in a factual vacuum and to devise criteria of sectarianism that bear no relationship to the dynamics and realities of church-related education in this country. Appellants' contention that the Establishment Clause issue in this case should be decided according to the alleged "sectarian" nature of schools receiving public funds is contrary to the weight of this Court's decisions. But even if that constitutional question is resolved as appellants urge, such a decision should be firmly rooted in a factual record developed through the adversary process and not on the basis of stereotypes and composite profiles which, for all the Court knows, exist only in the minds of appellants.

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[23] For an incisive critique of the *Horace Mann* decision, see R. Drinan, *Does State Aid to Church-Related Colleges Constitute an Establishment of Religion?—Reflections on the Maryland College Cases,* 1967 Utah L. Rev. 491.

B. Governing Constitutional Principles

In its most recent examination of the limitations imposed by the religion clauses of the First Amendment on governmental power, this Court observed:

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute." *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970).

The terse language of the Establishment Clause provides scant guidance for its application to specific governmental actions. However, in several leading decisions over the past 23 years, this Court has sketched in the contours of the Establishment Clause's restrictions on governmental power. To give form and substance to the Establishment Clause, those decisions have looked to the historical context in which the First Amendment was adopted and the modern societal values protected by the no-establishment guarantee.

The controlling constitutional standard has not emerged full-blown from any single decision of this Court. Rather, the test has evolved gradually as the Court has been required to apply the Establishment Clause prohibition to differing factual situations. Significantly, most of the leading decisions on this constitutional issue have involved the related problems of religion in the public schools[24] and public financial as-

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[24] *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963); *Engel* v. *Vitale,* 370 U.S. 421 (1962); *Zorach* v. *Clauson,* 343 U.S. 306 (1952); *McCollum* v. *Board of Education,* 333 U.S. 203 (1948); see also *Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

sistance to church-related education.[25] It is to that course of decisions that the Court must now look to resolve the constitutional questions raised by appellants.

1. Requirement of Government Neutrality

This Court has consistently recognized that, in Establishment Clause cases, the "constitutional standard is the separation of Church and State." *Zorach* v. *Clauson,* 343 U.S. 306, 314 (1952); *Board of Education* v. *Allen,* 392 U.S. 236, 242 (1968). However, the Court has also stressed that the Establishment Clause "does not say that in every and all respects there shall be a separation of Church and State." *Zorach* v. *Clauson, supra,* at 312; see *Walz* v. *Tax Commission,* 397 U.S. 664, 670 (1970). "The problem, like many problems in constitutional law, is one of degree," *Zorach* v. *Clauson, supra,* at 314; *Board of Education* v. *Allen, supra,* at 242, and the degree of separation demanded is defined by the requirement that government be neutral in matters touching upon the religious affairs of its people.[26]

The principle of neutrality recognizes that, while separation of church and state is the constitutional goal, total separation of those two institutions into wholly separate spheres of activity is simply not possible in

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[25] *Board of Education* v. *Allen,* 392 U.S. 236 (1968); *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

[26] See, *e.g., Walz* v. *Tax Commission,* 397 U.S. 664, 669-70 (1970); *Board of Education* v. *Allen,* 392 U.S. 236, 242 (1968); *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 226 (1963); *Zorach* v. *Clauson,* 343 U.S. 306, 313-14 (1952); *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947).

today's society.[27] As this Court has acknowledged, "[t]he complexities of modern life inevitably produce some contact" between government and religious institutions. *Walz* v. *Tax Commission*, 397 U.S. 664, 676 (1970). Particularly in seeking answers to modern social problems, the activities and concerns of churches and government frequently overlap.

Churches and religious societies, along with other private groups, have long devoted generous amounts of time and energy to the problems of health, old-age security and education. Indeed, in the early years of this Nation, religious institutions and other private groups were virtually the only agencies in society engaged in those general welfare activities.[28] With the rapid growth of the welfare state in this century, government has assumed an increasingly larger role in seeking solutions to social problems. But the effect of

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[27] Some language in this Court's early Establishment Clause decisions tended to encourage those with more absolutist concepts of the requirement of church-state separation. See Hutchins, *The Future of the Wall* in The Wall Between Church and State 17 (D. Oaks ed. 1963). Absolutists took particular comfort in the Court's reliance on Thomas Jefferson's statement that the Establishment Clause was intended to erect "a wall of separation between Church and State." *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947); *McCollum* v. *Board of Education*, 333 U.S. 203, 212 (1948). However, the metaphorical wall, and its absolutist connotations, have assumed less prominence in later Establishment Clause decisions as the Court has made clear that the required separation is to be defined by the concept of neutrality. As the Court observed in *Walz* v. *Tax Commission*, 397 U.S. 664, 670 (1970), "[n]o perfect or absolute separation is really possible."

[28] D. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 513-516 (1968); W. Stanmeyer, *Free Exercise and the Wall: Obsolescence of a Metaphor*, 37 Geo. Wash. L. Rev. 223, 225-28 (1968).

that increasing governmental activity has not been to displace the beneficial services performed by churches and religious societies. Those institutions have continued to maintain schools, hospitals, orphanages and homes for the aged, as their resources have permitted.

The resultant contracts between governmental agencies and religious institutions have been many and varied. Church-related schools are required to satisfy government standards of curriculum content and quality. See *Board of Education* v. *Allen,* 392 U.S. 236, 245-46 (1968). Church-sponsored hospitals and homes must comply with government health and safety regulations. The government makes available to those religiously affiliated institutions services, such as fire and police protection, sewage disposal, and public streets and highways, which are available to the public generally. See *Everson* v. *Board of Education,* 330 U.S. 1, 17-18 (1947); *Walz* v. *Tax Commission,* 397 U.S. 664, 667 (1970). And, in some instances, government has chosen to work through established private social welfare agencies, including those with church relationships, to achieve its public welfare goals. In view of these necessary and inevitable interactions between church and state in modern society, the principle of neutrality assures a course of governmental conduct which neither advances nor inhibits religion while permitting religiously oriented activities to co-exist in the secular world.

The principle of neutrality also serves to reconcile the dictates of the Establishment Clause with the frequently overlapping, and occasionally competing, commands of the Free Exercise Clause of the First Amendment. See *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963). For example, if Congress had done

what appellants now demand and had extended the benefits of the Higher Education Facilities Act to all public and private institutions of higher education except those with church relationships, a serious free exercise problem would arise from the disqualification based on religious affiliation. See *Sherbert* v. *Verner,* 374 U.S. 398 (1963). That an Establishment Clause challenge can pose a threat to Free Exercise values was explicitly recognized by this Court in the *Everson* case. While acknowledging the limitations imposed on state power by the Establishment Clause, the Court noted that

> "other language of the [First Amendment] commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." 330 U.S. at 16. (Emphasis in Court's opinion.)

More recently, this Court stated:

> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Walz* v. *Tax Commission,* 397 U.S. 664, 668-69 (1970).

Thus, the principle of neutrality seeks to minimize the potential conflicts between the two religion clauses of the First Amendment and to promote the goal of religious liberty which both clauses are designed to implement. The neutrality demanded of government by the Establishment Clause has been expressed in somewhat different language by the Court, but the limitations imposed on governmental power by the command of neutrality are not in dispute. Governmental actions must be such that "no religion be sponsored, none commanded, and none prohibited." *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970). Government can take no action that either advances or inhibits religion. *Board of Education* v. *Allen,* 392 U.S. 236, 242-43 (1968); *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963).

> "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970).

2. The Constitutional Test

From this Court's several Establishment Clause decisions, there has emerged a precise test for evaluating the constitutional validity of the interaction between government and religion in the realm of education. It is a test which fully implements the principle of neutrality and which places well-defined limitations on governmental actions. That test was first fully articulated in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963), as follows:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion

> then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Subsequently, the Court quoted that language of *Schempp* and applied the constitutional test it enunciated in *Board of Education* v. *Allen,* 392 U.S. 236, 243-44 (1968).

At issue in *Schempp* was the constitutionality of the practice of devotional Bible reading in the public schools. The Court ruled that such devotional exercises in public school classrooms had a purpose and primary effect that advanced religion. The appellants in *Allen* challenged on Establishment Clause grounds a New York statute that required local school boards to loan textbooks without charge to pupils in grades seven through twelve in both public and private schools, including those with religious affiliations. The Court concluded that the textbook loan program, in its purpose and primary effect, neither advanced nor inhibited religion.

The purpose and primary effect test, as first stated in *Schempp,* was neither a novel concept nor a departure from the Court's previous Establishment Clause declarations. For example, immediately before stating that test the Court referred to the cases in which "the Establishment Clause has been directly considered by this Court eight times in the past score of years." 374 U.S. at 222.[29] And the statement of the purpose and

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[29] See also *Walz* v. *Tax Commission,* 397 U.S. 664, 672 (1970), where, after citing with approval the application of the purpose and primary effect test in *Allen,* the majority commented: "In so holding the Court was heeding both its own prior decisions and our religious tradition."

primary effect test was immediately followed by citations to *Everson* v. *Board of Education,* 330 U.S. 1 (1947), and *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

Everson was the first case in which this Court explored at length the dimensions of Establishment Clause limitations on governmental action. The precise question in *Everson* was whether a New Jersey statute which authorized the use of public funds to reimburse parents for the cost of public transportation to send their children to schools, including religiously affiliated schools, was a law respecting an establishment of religion. The Court found no conflict between the challenged statute and the Establishment Clause. The articulated rationale for the Court's decision was that New Jersey had done no more than enact general public welfare legislation that permitted children to travel safely and expeditiously to and from schools, including those with religious affiliations. 330 U.S. at 17-18. But this Court has subsequently recognized that "[t]he statute upheld in *Everson* would be considered a law having 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion.'" *Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968); see also *McGowan* v. *Maryland,* 366 U.S. 420, 443-44 (1961).

In *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), the Court for the first time invalidated legislation because it conflicted with the Establishment Clause. At issue in *McCollum* was Illinois' "released time" program, under which public school students who desired to participate were released from their regular classes for thirty minutes a week to receive religious instruction on public school premises. The religious

instruction was given by individuals paid by various churches and religious groups in local communities. The Court ruled that the Illinois program conflicted with the Establishment Clause because that program amounted to "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." 333 U.S. at 210. Clearly, such a program had a purpose and a primary effect that advanced religion.

The purpose and primary effect test began to take shape in *McGowan* v. *Maryland,* 366 U.S. 420 (1961), when the Court ruled that Maryland's Sunday closing laws did not violate the Establishment Clause. In explaining the basis for that ruling, the Court said:

> "Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern [for the health, safety, recreation and general well-being of our citizens] wholly apart from their original purposes or connotations. The present *purpose and effect* of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals." 366 U.S. at 445 (Emphasis added.)

Subsequently, the Court struck down a provision of the Maryland Constitution that required all public officials to declare a belief in the existence of God. *Torcaso* v. *Watkins,* 367 U.S. 488 (1961). In the course of that decision, the Court stated:

> "There is, and can be, no dispute about the *purpose or effect* of the Maryland Declaration of Rights requirement before us—it sets up a religious test which was designed to and, if valid, does bar every person who refuses to declare a

> belief in God from holding a public 'office or profit or trust' in Maryland." 367 U.S. at 489-90 (Emphasis added.)

The challenged state constitutional provision was invalidated because, in its purpose and primary effect, it advanced religion.

Finally, the Court employed the purpose and effect analysis in its most recent Establishment Clause decision—*Walz* v. *Tax Commission,* 397 U.S. 664 (1970). There the Court ruled that states did not violate the Establishment Clause by exempting church property from taxation. The Court held that "[t]he legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion." 397 U.S. at 672. But its analysis did not end there, for the Court recognized that its prior decisions also required it to examine "the end result—the effect" of the challenged tax exemptions. 397 U.S. at 674. The exemption of church property from taxation was sustained only after the Court was satisfied that neither the purpose nor the effect of such exemptions conflicted with the Establishment Clause.

Thus, the purpose and primary effect test, as enunciated in *Schempp* and *Allen*, is the constitutional standard that governs the Establishment Clause issue in this litigation. It is a test which assures that government will maintain its required posture of neutrality in matters touching upon religion. It is a test which has emerged gradually but definitively as this Court has been required to apply the no-establishment limitation to differing factual situations. And it is the test which the Court applied in *Allen* to the precise question in this case—namely, whether the Es-

tablishment Clause prohibits the government from including church-related schools in general programs of aid to education.

3. Benefits to Religion

A challenged statute will not run afoul of the Establishment Clause merely because religion or religious institutions happen to derive benefits from it. That principle is a necessary corollary of the purpose and primary effect test. The formulation of the purpose and *primary* effect test necessarily presupposes that any governmental program will generate a number of effects. What is demanded by that test is that there be a primary effect that is secular. Once that requirement is satisfied, a challenged program will be considered to be consistent with the Establishment Clause, even though it also has the incidental effect of conferring certain tangible benefits on religion or religiously affiliated institutions.

Thus, in *Everson* v. *Board of Education,* 330 U.S. 1, 17 (1947), the Court upheld the New Jersey statute even though it recognized that "children are helped to get to church schools" and that "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets." Similarly, in *Board of Education* v. *Allen,* 392 U.S. 236, 244 (1968), the Court acknowledged that "[p]erhaps free books make it more likely that some children choose to attend a sectarian school."[30] Surely a religiously affiliated

[30] In fact, when the Court cited the result in *Allen* with approval in *Walz* v. *Tax Commission,* 397 U.S. 664, 671-72 (1970), it did so despite its statement that the textbook loan law relieved churches sponsoring schools "of an enormous aggregate cost for those books."

school benefits and becomes a more viable institution when more children attend it as the result of a public spending program. See *Walz* v. *Tax Commission,* 397 U.S. 664, 670-72 (1970). But such an effect "does not alone demonstrate an unconstitutional degree of support for a religious institution." 392 U.S. at 244. Such an effect will not make the spending program constitutionally infirm as long as the program generates the required primary secular effect.

Tangible benefits have flowed to religion from other governmental programs sustained by this Court. For example, in *McGowan* v. *Maryland,* 366 U.S. 420 (1961), Sunday closing laws were upheld despite the benefits derived from them by religion, because they had the purpose and primary secular effect of providing a uniform day of rest and recreation for all citizens. 366 U.S. 442-45. Similarly, the exemption of church property from taxation was sustained even though the Court conceded that churches derive tangible economic benefits from such exemptions. *Walz* v. *Tax Commission,* 397 U.S. 664, 674 (1970).

When, as here, a governmental spending program for the improvement of education, health or the general welfare is attacked on Establishment Clause grounds, the incidental benefit corollary to the purpose and primary effect test simply recognizes the realities of our social order and implements the principle of neutrality. Such governmental programs typically seek to draw upon the experience and resources of all qualified public and private agencies to achieve the program's goals. Because of the prominent role traditionally played by church-related organizations in public welfare work, the exclusion of such organizations from governmental programs designed

to improve and expand those welfare services could properly be viewed as governmental hostility to religion.[31] Such an exclusion would also tend to frustrate the government in the achievement of legitimate secular goals.[32]

To be sure, allowing church-related organizations to participate in public welfare spending programs may enhance their capacity to provide various welfare services, such as a better education in the sciences. But, under the incidental benefit corollary, that fact is not decisive in resolving the Establishment Clause issue. The central inquiry, the focus of the purpose and primary effect test, remains whether a primary effect of the expenditures is the achievement of the program's legitimate secular goals.

4. Determining a Statute's Purpose and Primary Effect

The remaining problem is the basis for determining whether a challenged statute has a purpose and primary effect of advancing or inhibiting religion. The Establishment Clause issue in this case arises because church-related colleges and universities have been included in a major federal program designed to expand educational opportunities. This Court's decisions in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), provide precise guidance for applying the purpose and primary effect test to such a statutory scheme.

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[31] Government hostility toward religion is plainly forbidden by the Establishment Clause. See *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); *McCollum* v. *Board of Education*, 333 U.S. 203, 211-12 (1948).

[32] See *Lemon* v. *Kurtzman*, 310 F. Supp. 35, 47 (E.D. Pa. 1969), *prob. juris. noted*, 397 U.S. 1034 (1970).

a. *Secular Purpose*

The *Allen* decision requires that a challenged statute's purpose be determined by reference to any statement of legislative purpose appearing on the face of the statute. For example, the Court noted that New York's textbook loan law was based on legislative "findings that the 'public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.'" 392 U.S. at 239. Then, after stating the purpose and primary effect test as the controlling constitutional standard, the Court declared:

> "The express purpose of [the challenged statute] was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its *stated purpose.*" 392 U.S. at 243. (Emphasis added.)

The *Allen* decision did not fashion new law in focusing the inquiry on the statute's statement of purpose. For it has long been the rule that "the specific statement of primary purpose in the act governs." *Arizona* v. *California*, 283 U.S. 423, 456 (1931).

b. *Primary Secular Effect*

Whether a challenged statute has the requisite primary secular effect is complicated by the fact that a legislative enactment will invariably produce a multiplicity of effects, some of which are clearly secular and some of which may be characterized as religious. In the context of this case, the problem arises because federal funds have been expended to increase educa-

tional opportunities through the construction of secular academic facilities and because some of those funds have been awarded to church-related institutions of higher education. *Allen* establishes the basis for deciding whether such a statute *advances* religion and *Walz* sets forth the criteria for determining whether it *inhibits* religion. A principal focus of the inquiry is whether the primary effect of the contested expenditures is to be evaluated by examining *the secular or non-secular use made of the federal funds* or by examining *the secular or non-secular nature of the institutions* receiving those funds.

The Court in *Allen* placed substantial reliance on its earlier decision in *Everson* in upholding the New York textbook loan law. The appellants in *Allen* argued quite forcefully that *Everson* could not control because free bus rides are constitutionally distinguishable from free textbooks. The basis for the proffered distinction was that textbooks, unlike bus transportation, aid the educational process in church-related schools and that "[t]here is no such thing as secular education in a sectarian . . . school." Brief for Appellants, p. 16, *Board of Education* v. *Allen,* 392 U.S. 236 (1968). The Court found that argument unpersuasive, unsupported by the record in the case and at odds with its prior decisions.

The Court opened its review of those prior decisions by declaring that "this Court has long recognized that religious schools pursue two goals, religious instruction and secular education," 392 U.S. at 245; see also *Everson* v. *Board of Education,* 330 U.S. 1, 3 (1947), and concluded by asserting:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court

> decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. . . . Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education." 392 U.S. at 247-48.

The challenged New York statute was sustained because it authorized only the lending of secular textbooks to students, whether they attended public or religiously affiliated schools. 392 U.S. at 244-45. And the Court stressed that the textbook loan law did not result in "unconstitutional involvement of the state with religious instruction." 392 U.S. at 248.

Thus, the secular-religious dichotomy in the functions of religiously affiliated schools and the limitation of public assistance to the secular function was the precise focus of the Court's primary effect analysis in *Allen*. The contested statute was sustained because it subsidized only the secular educational functions performed by church-related schools and did not involve the government in the religious functions of those schools. That test of primary effect is wholly consistent with this Court's prior Establishment Clause decisions. In *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), the Court invalidated Illinois' "released time" program because tax-supported property was subsidizing religious instruction. *Cf. Zorach* v. *Clauson,* 343 U.S. 306, 308-09 (1952). But, in

Everson v. *Board of Education*, 330 U.S. 1, 18 (1947), the Court agreed that church-related schools could share in those public benefits which are "so separate and so indisputably marked off from the religious function" performed by those schools. Consequently, the court below applied the proper test of primary effect when it ruled that "[t]he focus of this test as applied in *Allen* is the function, secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid." J.A. 49.

Focusing on the educational function subsidized by public funds assures a full measure of protection for Establishment Clause values while not unnecessarily hampering government in its efforts to improve education generally and to expand educational opportunities. This Court observed in *Allen*:

> "Americans care about the quality of secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create." 392 U.S. at 247.

When government undertakes a general spending program for education, Establishment Clause values will be fully safeguarded if the funds allocated to schools with religious affiliations do not subsidize religious instruction or the other religious functions performed by those schools. At the same time, no Establishment Clause value is threatened when government seeks to aid secular education generally and, therefore, no Establishment Clause value is furthered by excluding

the significant number of students in religiously affiliated schools from the benefits of such aid.[33]

Excluding church-related schools from public spending programs for secular education simply because those schools have religious affiliations would also tend to frustrate the achievement of important legislative goals. When the Higher Education Facilities Act was being considered and debated, Congress was provided with statistics showing that, in the 1961-1962 academic year, there were a total of 2,040 institutions of higher education in the United States. Of that total, only 711 institutions were public. And, of the 1,329 private colleges and universities, 817 claimed church relationships.[34] Congress was told that state colleges and universities were rapidly approaching the limits of their expansion capacity[35] and that private colleges and universities had to be included in the proposed legislation if the burgeoning student population was to be accommodated.[36] Clearly, the manifestly secular goals of the Higher Education Facilities Act would have been frustrated if Congress had

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[33] The Court noted in the *Allen* decision that more than twenty-two per cent of New York students attended nonpublic schools. The comparable nationwide figure was placed at ten per cent. 392 U.S. at 248, n. 9. The great majority of nonpublic schools in this country are church-related. At the college level, 40 per cent of all institutions of higher education claim church relationships. *Hearing on H.R. 3000, supra* note 1, at 311.

[34] *Hearings on H.R. 3000, supra* note 1, at 311; 109 Cong. Rec. 19378 (1963) (remarks of Senator Morse).

[35] See, *e.g.*, *Hearings on H.R. 3000, supra* note 1, at 533-40 (statement and testimony of Dr. Mason W. Gross, President of Rutgers University).

[36] See, *e.g.*, *Hearings on H.R. 3000, supra* note 1, at 749, 753-54 (testimony of Dr. Fred H. Harrington, President of the University of Wisconsin).

been forced to eliminate 40 per cent of the Nation's colleges and universities—those with church relationships—from participation in the Higher Education Facilities Act.

The fact that government purports to aid only secular educational functions does not necessarily foreclose an Establishment Clause challenge to the validity of awarding public funds to church-related schools under general education legislation. In *Allen,* the Court was faced with a "meager record" containing nothing to refute the legislative and public judgment that church-related schools perform the dual functions of secular education and religious instruction. 392 U.S. at 248. The decision in *Allen,* however, clearly permits those challenging particular forms of aid to church-related education to show that, in fact, the public assistance is not confined to the secular educational functions of church-related schools. The challengers would presumably prevail if they could show that the publicly assisted secular functions of religiously affiliated schools are so permeated by religion that no meaningful distinction could be drawn between the secular and religious functions of participating church-related schools.[37] But, absent such a showing

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[37] See W. Valente, *Aid to Church Related Education—New Directions Without Dogma*, 55 Va. L. Rev. 579, 588-89 (1969); *cf.* J. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Calif. L. Rev. 260, 291-303 (1968).

Proof of such a fusion of the secular and religious functions would stand on a far different legal footing from the unsubstantiated assertions of the appellants in *Allen* that permeation was a fact of the educational life of church-related schools. The appellants in *Allen* were, in effect, asking for a constitutional presumption of permeation. The Court rejected that presumption and firmly established the presumption of nonpermeation. But the Court did not foreclose the possibility of overcoming the presumption of nonpermeation by proof to the contrary.

of permeation, government can constitutionally extend financial assistance to the secular educational functions of church-related schools.

Thus, under *Allen,* a governmental spending program to assist education does not have the effect of advancing religion as long as it subsidizes only the secular educational functions performed by participating church-related schools. The further question whether such a program has the effect of inhibiting religion is governed by the *Walz* decision.

After satisfying itself that the contested property tax exemption did not have the purpose of "establishing, sponsoring, or supporting religion," the Court in *Walz* declared: "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion." 397 U.S. at 674. The only and obvious alternative to exempting church property from taxation was to require that property be taxed. The Court concluded that the effect of exempting churches from taxation was "a lesser involvement than taxing them." 397 U.S. at 674-75.

The Court in *Walz* was not faced with any governmental program in which public funds flowed to church-related institutions. But, in the course of that decision, the Court observed:

> "[A] direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . . ." 397 U.S. at 675.

Thus, the Court apparently contemplated application of its test of government entanglement or involvement

to public spending programs that benefit, *inter alia*, church-related groups.[38]

The *Walz* decision indicates that government entanglement or involvement with religion carries the danger of governmental interference with religion that could lead to inhibition of religion. For example, in highlighting the evils inherent in taxing churches, the Court stated that such a practice would result in "tax valuation of church property, tax liens, tax foreclosures." 397 U.S. at 674. In addition, in commenting on the soundness of the *Allen* and *Everson* decisions, which validated public assistance to church-related education, the Court observed:

> "With all of the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, *we have been able to chart a course that preserved the autonomy and freedom of religious bodies* while avoiding any semblance of established religion." 397 U.S. at 672. (Emphasis added.)

Thus, the *Walz* test of government entaglement or involvement with religion is the basis for determining whether a public education program which benefits religiously affiliated schools has the prohibited effect of inhibiting religion.

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[38] The *Walz* language referring to direct money subsidies appears in that portion of the Court's opinion which discusses the alternatives of taxing or exempting from taxation churches *qua* churches. Thus, it would appear that the direct money subsidies discussed by the Court referred to such subsidies to churches *qua* churches. It is not clear that the dangers of "sustained and detailed administrative relationships" would be of the same kind or quality when public money flows to religiously affiliated organizations which are not engaged in strictly religious activities.

Walz does not bar all involvement, administrative or otherwise, between government and religious organizations. "The test is inescapably one of degree." 397 U.S. at 674. The Court recognized that "[e]ither course, taxation of churches or exemption, occasions some degree of involvement with religion." *Id.* Exemption was the preferred course of governmental conduct because it produced a "lesser" involvement. 397 U.S. at 674-75. Similarly, while recognizing that the necessary administrative relationships in government aid to the secular functions of church-related schools involved "risks," the Court did not view those relationships alone as constitutionally prohibited. 397 U.S. at 672. The Establishment Clause bars only "excessive" involvement between government and religion "calling for official and continuing surveillance *leading to an impermissible degree of entanglement.*" 397 U.S. at 675. (Emphasis added.)

The problem, therefore, is to determine which involvements between government and religion are "excessive" or "impermissible." The *Allen* decision resolves that problem when the Establishment Clause issue arises in the context of public assistance to church-related education. In sustaining the validity of government financial assistance to the secular educational functions of church-related schools, *Allen,* consistent with this Court's prior Establishment Clause decisions, requires that such government aid be strictly limited to those secular educational functions. Consequently, statutory and administrative schemes of such public assistance programs which do no more than assure that public funds are not spent for other than secular educational functions cannot be "excessive" or "impermissible."

The *Walz* decision recognized that most government grant programs contain comprehensive statutory and administrative schemes to assure compliance with statutory standards and requirements. 397 U.S. at 675. Such statutory and administrative schemes have the wholesome purpose and function of assuring a proper use of public funds and of seeking to secure the achievement of the program's goals. Typically, the statutory and administrative requirements are particularly stringent when government chooses to work through private organizations to achieve its goals.[39] Legislatures clearly have the right and the duty to impose stringent controls over the disbursement of tax funds. Taxpayers demand nothing less of their elected representatives.

Problems of impermissible and excessive government involvement with religion would be presented if the administrative controls placed on church-related schools were broader than necessary to assure a proper and purely secular use of government funds. The most serious of such problems would be any effort by public officials to regulate or interfere with the religious functions of church-related schools. Government cannot constitutionally support the religious functions of such schools. Neither can it seek to control or supervise those religious functions. Such governmental action would result in serious inhibition of religion and lead to the very form of government entanglement and involvement with religion that *Walz* declared to be excessive and impermissible. Indeed, such governmental

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[39] See, *e.g.*, Hill-Burton Act of 1964, 42 U.S.C. § 291; Mental Retardation Facilities and Mental Health Centers Act, 42 U.S.C. §§ 2261, 2281-88q; Economic Opportunity Act, 42 U.S.C. §§ 2701, 2711-68, 2941-80.

action would smack of an unconstitutional condition upon the availability of government funds. See *Speiser* v. *Randall*, 357 U.S. 513 (1958).

The final inquiry in the primary effect analysis is how to determine which of the several effects generated by a challenged statute is to be considered primary for Establishment Clause purposes. Here again the *Allen* decision guides the inquiry. In that case, the Court stressed that there was "nothing about the necesary effects of the statute that is contrary to its stated purposes." 392 U.S. at 243. Thus, a statute's effects are to be evaluated according to their relationship to the legislation's purposes. The concern is with whether the statute produces an effect consistent with its purposes. If there is such an effect, it will be deemed primary in the application of the purpose and primary effect test.

Such an analysis comports with reason and logic. When the legislature seeks to achieve certain secular goals, the judicial inquiry should be directed to whether the statute in its operative effects achieves those goals. To concentrate on effects unrelated to a statute's goals would be to disregard the central concerns of a legislature's efforts. Here, Congress having acted to aid secular education, the principal inquiry should be whether the statutory scheme has had that effect. If it has, that effect should necessarily be viewed as the primary impact of the legislation. To focus on the fact that church-related schools have derived benefits from the statute would emphasize an effect that has consistently been considered incidental to central Establishment Clause concerns. For, from *Everson* through *Walz*, this Court has repeatedly ruled that an otherwise valid legislative enactment will not be struck

down on Establishment Clause grounds because religion or religiously affiliated institutions benefit incidentally from the enactment.

Thus, when government undertakes to aid secular education generally, benefits derived by church-related schools from such a program will not have a primary effect that either advances or inhibits religion if only the secular educational functions of those schools are aided and if the administrative relationships created by the program are no more extensive than necessary to assure a proper and constitutional use of the public funds.

5. Applying the Governing Constitutional Principles

Applying the governing Establishment Clause principles outlined above to the facts of this case, there can be no doubt that the Higher Education Facilities Act passes constitutional muster.

Congress plainly stated the purpose of that statute in the legislative findings and declaration of policy that precede the Act's substantive provisions:

> "The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate

institutions, junior and community colleges, and technical institutes, in providing certain academic facilities." 20 U.S.C. § 701

This Court need not look beyond that express statement of statutory purpose, although the court below correctly noted that the statutory findings had ample support in the evidence of the crisis in higher education presented to Congress. J.A. 48-49. The stated purpose of the challenged statute is patently and demonstrably secular. There is no mention of religion or religiously affiliated schools. The congressional concern was with safeguarding the national security and welfare by providing maximum educational opportunities for the growing number of Americans seeking the fullest possible development of their intellectual capabilities. The statutory purpose was to satisfy that urgent need by assisting institutions of higher education generally to expand their academic facilities sufficiently to accommodate the rapidly expanding student population. No statute could have a more obviously secular purpose. To suggest that the congressional findings and declaration of policy contain a religious purpose borders on frivolity.[40]

The Higher Education Facilities Act has also generated the required primary secular effect. Such an effect is conclusively demonstrated by the evidence presented at the trial of this action and by an examination of the statutory and administrative scheme of the enactment.

Institutions of higher education eligible for Title I grants are defined by the statute in religiously neu-

[40] Appellants make just such a suggestion in their brief. The faulty analysis that led appellants to that conclusion is examined at pp. 70-75, *infra*.

tral terms. Such institutions must be, *inter alia,* nonprofit, accredited and legally authorized to provide a program of education beyond high school. 20 U.S.C. § 751(f). Any college or university—public, private or church-related—which satisfies those criteria can qualify for a Title I grant if it can demonstrate that the planned academic facility

> "will, either alone or together with other construction to be undertaken within a reasonable time, (1) result in an urgently needed substantial expansion of the institution's student enrollment capacity, capacity to provide needed health care to students or personnel of the institution, or capacity to carry out extension and continuing education programs on the campus of such institution, or (2) in the case of a new institution of higher education, result in creating urgently needed enrollment capacity, capacity to provide needed health care to students or personnel of the institution, or capacity to carry out extension and continuing education programs on the campus of such institution." 20 U.S.C. § 716

Thus, the statutory goal of expanding educational opportunities generally is precisely implemented by the requirements imposed for eligibility for Title I grants.

The evidence at the trial of this action focused on how four colleges and universities in Connecticut contributed to the stated statutory goals. The statute requires that state agencies processing applications for Title I grants establish criteria for determining priorities among the applications submitted by colleges and universities in the state. 20 U.S.C. §§ 715, 717. Those criteria seek to assure that the limited federal funds available under Title I will produce a maximum increase in enrollment capacity. The Connecticut Com-

mission on Aid to Higher Education has complied with that statutory mandate, and the criteria it has established are religiously neutral. See Findings of Fact ¶ 20, J.A. 60; PX 1.[41] The appellee colleges and universities have consistently recorded high scores under those criteria, PX 2-8,[42] indicating that those schools are making major contributions to the achievement of the statute's secular goals. See Findings of Fact ¶ 31, J.A. 62.

The statute contains safeguards to assure that any Title I funds awarded to church-related colleges and universities will support only the secular educational functions of those schools. Specifically excluded from the definition of an eligible academic facility is any facility that will be used for "sectarian instruction" or "religious worship" or in connection with a school or department of divinity. 20 U.S.C. § 751(a)(2). That prohibition remains for the full twenty years that the federal government retains an interest in Title I facilities. 20 U.S.C. § 754. The prohibitions of 20 U.S.C. § 751(a)(2) are implemented by the requirement that each applicant for a Title I grant provide specific assurances that there will be no such prohibited use of a funded facility. Findings of Fact ¶ 18, J.A. 59. Each of the applications for Title I grants by the appellee colleges and universities contained such assurances. Findings of Fact ¶ 32, J.A. 63. In addi-

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[41] The designation "PX" refers to exhibits placed in evidence at trial by appellants.

[42] In fact, the appellee colleges and universities have generally scored higher than other institutions of higher education in Connecticut that appellants designated as constitutionally eligible to receive public funds in their complaint. Complaint ¶ 26, J.A. 13, 33.

tion, each of the appellee colleges and universities presented uncontroverted evidence at trial to show that its Title I facility or facilities were being used or would be used for solely secular purposes. J.A. 101-21.

The evidence of the appellee institutions went beyond the statutory restrictions on the use of their Title I facilities and directly confronted the issue of permeation. For example, appellee Fairfield University established that no religious limitations would be imposed on the content of courses taught in its new science building. Findings of Fact ¶ 40, J.A. 65. Similarly, appellees Fairfield University and Sacred Heart University showed that no religious restrictions were placed on books acquired for their federally funded libraries. Findings of Fact ¶¶ 35, 39, J.A. 63, 64. Appellants failed completely to produce any affirmative proof of permeation in connection with the five Title I facilities at issue, even though they indicated that such proof would be a part of their case.[43] As a consequence, the court below found that the five Title I grants received by the appellee institutions would support only the secular educational functions of those schools. Findings of Fact ¶¶ 26-42, J.A. 61-66.

Thus, both the provisions of the challenged statute and the proven results of awarding Title I grants to the appellee colleges and universities leave no doubt that the Higher Education Facilities Act subsidizes only the secular educational functions of participating church-related institutions of higher education. And the fact that the appellee institutions have demonstrated their ability to contribute to the statute's stated goals is proof that the primary effect of awarding Title

[43] See Trial Transcript 28-30.

I grants to church-related schools is to implement the congressional purpose in enacting the statute. Therefore, the primary effect of the Act is not to advance religion.

Whether the challenged statute's primary effect operates to inhibit religion requires an examination of the administrative relationships that result from granting federal funds to church-related colleges and universities.[44] The evidence presented at trial suggests that essentially "paper" relationships result from the administration of the Act.

The administrative process is triggered when a college or university applies for a Title I grant. All such applications require a specific assurance from the applicant that no part of a Title I facility will be used for "sectarian instruction" or "religious worship" or in connection with a school or department of divinity. Findings of Fact ¶ 18, J.A. 59.[45] The application itself and the instructions for completing the application emphasize the consequences of that assurance. J.A. 80. The state agency that administers the Title I program determines a particular school's eligibility solely on the basis of its written application and supporting documentation, J.A. 80-81, and further review by federal officials is also based solely on written submissions from the applicant and the state agency. J.A. 81-82. In effect, the state and federal officials responible for administering the statute rely on the

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[44] The regulations governing the administration of the Higher Education Facilities Act are found at 45 C.F.R. pt. 170 (1969).

[45] The application also demands a number of other assurances from the applicant. J.A. 87-88.

integrity of a church-related college that assures them there will be no religious use of a Title I facility.[46]

Successful applicants for Title I grants are notified on a "Grant Agreement" form which reiterates the institution's obligation to comply with all assurances contained in its application. J.A. 89. Thus, the institution's promise not to use a Title I facility for religious purposes becomes a contractual undertaking, and the institution's failure to comply with that undertaking leaves the government with all of the remedies available to an aggreived party in a breach of contract action. In addition, the federal government has undertaken a program of post-grant reviews of Title I facilities to assure itself that colleges and universities with such facilities are complying with all terms and conditions of their grants, including the requirement that such facilities not be used for religious purposes. The review consists principally of discussions with school officials and examination of course descriptions of subjects taught in Title I facilities. See J.A. 82.

Thus, the administration of the Higher Education Facilities Act is based on the assumption that a recipient of a Title I grant will comply with restrictions imposed on such a grant, once those restrictions are made known. That assumption of good faith fosters harmonious and limited relationships between public officials and church-related colleges and universities. There is no monitoring or surveillance of classroom activities. In fact, the Act specifically prohibits any

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[46] The evidence at trial, showing that the appellee institutions used their Title I facilities for solely non-religious purposes, demonstrates that the statute's administrators can safely rely on such assurances made by church-related schools.

federal control over "the personnel, curriculum, methods of instruction, or administration" of institutions receiving Title I grants. 20 U.S.C. § 757. More importantly, there is no involvement of public officials in the religious functions of church-related institutions. The interest of those officials is carefully limited to the uses made of specific, federally funded facilities.

An administrative relationship based on the assumption that the recipients of federal funds will comply with the law is consistent with this Court's decisions. For example, in the *Allen* decision the Court refused to assume that state officials "will not honestly discharge their duties under the law" to provide only secular textbooks to church-related schools. 392 U.S. at 245. Federal and state officials are equally entitled to assume that church-related colleges and universities will honor their promises not to use a Title I facility for religious purposes.

At the same time, those administering the challenged statute have been able to uncover a few cases in which there have been improper religious uses of Title I facilities and to resolve those problems harmoniously. See J.A. 82-84. In one of those cases, the misuse of the funded facility came to the attention of the Office of Education through a newspaper clipping. In another case, the misuse was discovered by another federal agency during a routine inspection. J.A. 82-83.

Neither the record in this case nor the overall regulatory scheme will support the conclusion that the necessary administrative relationships involved in awarding Title I grants to church-related schools will lead to excessive or impermissible involvement of govern-

ment with religion. The regulatory scheme is carefully tailored to assure only a proper and constitutional use of federal funds. No government involvement with the religious functions of church-related schools is required and none results. Consequently, the Higher Education Facilities Act does not have the effect, primary or otherwise, of inhibiting religion.

Thus, applying the governing constitutional principles to the facts of this case, the Higher Education Facilities Act has a purpose and primary effect that neither advance nor inhibit religion. As a result, the court below correctly concluded that appellants' Establishment Clause claims are without merit.

C. Appellants' Arguments

1. The So-Called Everson Test

Appellants' principal legal argument is based on the decision in *Everson* v. *Board of Education,* 330 U.S. 1 (1947), which appellants read as barring all public aid programs which "support" or "subsidize" religiously affiliated schools. They derive that rule of law from the following sentence in *Everson*:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U.S. at 16.

This Court, referring to another sentence in the paragraph containing the "no tax" language quoted above, recently commented on "[t]he hazards of placing too much weight on a few words or phrases of the Court," *Walz* v. *Tax Commission,* 397 U.S. 664, 670 (1970).

Appellants' efforts to construct a constitutional test from that single sentence in *Everson* abundantly illustrate the "hazards" the Court perceived.

The essential difficulty with appellants' heavy reliance on the "no tax" language in *Everson* is that the Court neither intended to nor did it in fact postulate that sentence as a legal test to assess the validity of all public spending programs for education which benefit church-related education. The sentence containing the "no tax" language is one of several in *Everson* in which the Court attempted, in very broad and abstract language, to describe the general categories of problems which fall within the purview of the Establishment Clause. See 330 U.S. at 15-16. But that sentence was in no sense self-defining in the limitations it suggested that the Establishment Clause imposed upon government spending power.

The point is well illustrated by appellants' efforts to employ the decision in *Flast* v. *Cohen,* 392 U.S. 83 (1968), to support their substantive Establishment Clause argument. See Appellants' Brief, pp. 21-22. The Court in *Flast* held only that a federal taxpayer has standing, and therefore presents a justiciable controversy, when he challenges a federal spending program on Establishment Clause grounds. The Court pointedly stated that it was not passing on the merits of such an Establishment Clause issue. 392 U.S. at 106. Thus, the Court in *Flast* did no more than it did in the "no tax" language in *Everson.* In both instances, the Court was simply acknowledging that a colorable Establishment Clause issue arises from a public spending program which benefits church-

related education.[47] But in neither instance was the Court laying down a constitutional test for deciding that issue.

The principal defect of the "no tax" language of *Everson* as a test of constitutional validity is the imprecise and indefinite limitations it purports to impose on government power. That language requires further refinement and definition for application to specific public spending programs. For example, the "no tax" language seems to bar any aid to an institution that "teaches or practices religion." Read literally, the "no tax" language would preclude all public aid to any school, whether it be public or private, that offered any courses about religion or that made any provisions for religious exercises. But even appellants do not urge that literal reading of their so-called *Everson* test. Rather, they claim that the *Everson* prohibition extends only to those schools in which "the propagation, teaching or practice of religion is a meaningful or major part of [their] existence." Appellants' Brief, p. 9. However, standing alone, the "no tax" language provides no guidance to a court in making that determination.

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[47] It is for that reason that the appellee colleges and universities do not contend that the fact of an institution's church relationship is wholly irrelevant to such an Establishment Clause claim. No such claim could survive a facial challenge if no public funds flowed to church-related schools. Thus, if such a recipient institution were to deny any church relationship, the moving party would be entitled to establish the church relationship through proof. However, no such problem existed in this case because each of the appellee schools, through stipulations of fact, admitted their church relationships. Once the fact of a church relationship is established, the Establishment Clause inquiry is limited to the nature of the educational function subsidized by the public funds.

Even the word "support" in appellants' *Everson* test is of uncertain meaning. For example, in *Board of Education* v. *Allen,* 392 U.S. 236, 244 (1968), the Court ruled that the New York textbook loan law did not amount to "an *unconstitutional degree of support* for religious institutions." (Emphasis added.) That explicit ruling was necessarily implicit in the holdings in both *Everson* and *Allen* sustaining public spending programs that conferred tangible and significant benefits on religiously affiliated schools. For example, in *Walz* v. *Tax Commission,* 397 U.S. 664, 671-72 (1970), the Court cited *Allen* with approval even though it stated that the textbook loan program "relieved those churches [sponsoring schools] of an enormous aggregate cost for those books."

Since the "no tax" language of *Everson* does not define what constitutes an unconstitutional degree of support for religious institutions, the Court must look elsewhere for the test of permissible public support for such institutions. And the test prescribed by the Court's opinions is the purpose and primary effect test enunciated and applied in *Schempp* and *Allen.*[48] If

[48] Appellants claim to find support for their *Everson* test in the fact that this Court has quoted the "no tax" language in several Establishment Clause decisions. But the decisions that have quoted the "no tax" language have in no sense adopted that language as a constitutional test. For example, the "no tax" language is quoted in part in the *Allen* decision. 392 U.S. at 242. But, on the following page, the Court quoted in full that portion of the *Schempp* decision which articulated the purpose and primary effect test and then followed that quotation with the observation that "[t]his test is not easy to apply." 392 U.S. at 243. The Court certainly would not have identified the purpose and primary effect language of *Schempp* as the test it was applying if it had viewed the "no tax" language of *Everson* as the controlling constitutional standard.

a public spending program for education does not have a purpose and primary effect that either advances or inhibits religion, it will not result in an unconstitutional degree of support for participating religiously affiliated schools.

2. Bradfield v. Roberts

The complete answer to appellants' so-called *Everson* test is this Court's decision in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). That decision demonstrates that, despite appellants' elaborate arguments to the contrary, there is no absolute constitutional bar to public support for church-related institutions. In addition, *Bradfield* provides the precise basis for determining whether an institution is "sectarian," if that determination is considered relevant to the Establishment Clause issue in this case.

The appellant in *Bradfield* challenged a grant of federal funds to Providence Hospital in the District of Columbia. The appellant alleged in his complaint that the hospital was operated by "members of a monastic order or sisterhood of the Roman Catholic Church, and is conducted under the auspices of said church." 175 U.S. at 292. The appellant further alleged that, because of the "sectarian character of . . . Providence Hospital," any grant of federal funds to that institution would be "contrary to the article of the Constitution which declares that Congress shall make no law respecting a religious establishment." 175 U.S. at 293. This Court found no merit in the appellant's constitutional claim, holding that the hospital took its legal character from its act of incorporation and that, under its act of incorporation, the hospital was purely a secular institution. The Court's opinion leaves no doubt

that it viewed as wholly immaterial the facts upon which the appellant alleged that the hospital was a "sectarian" institution.[49]

> "Assuming that the hospital is a private eleemosynary corporation, the fact that its members, according to the belief of the complainant, are members of a monastic order or sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial. . . . The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into

[49] Throughout this litigation, appellants have argued that those same facts should be considered in determining whether the appellee colleges and universities are sectarian.

> a religious or sectarian body. That fact does not alter the legal character of the corporation, which is incorporated under an act of Congress, and its powers, duties, and character are to be solely measured by the charter under which it alone has any legal existence." 175 U.S. at 297-98.

Thus, as long as an institution was created as a secular corporation and is being "managed pursuant to the law of its being," 175 U.S. at 298, even an intense relationship between that institution and a religious body will not make it constitutionally ineligible for public funds.

Apparently recognizing the fatal impact of *Bradfield* on their central legal theory, appellants suggest that educational institutions stand on a different constitutional footing from hospitals. That suggested distinction finds no support in this Court's decisions.[50]

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[50] Appellants urge their distinction between hospitals and educational institutions, in part, because the Court in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), did not rely on *Bradfield*. There is a similar omission in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), which is the only other decision of this Court to consider the constitutional validity of public aid to church-related education. However, the Court's failure to rely on *Bradfield* in *Everson* and *Allen* cannot be read as holding *Bradfield* inapplicable to educational institutions because the records in both *Everson* and *Allen* would not support an application of *Bradfield*. For *Bradfield* to be applicable, the church-related institution in question must have been incorporated under a state or federal secular incorporation law. The records in *Everson* and *Allen* contained no evidence that the parochial schools benefitting from the challenged programs were so incorporated. Because Catholic elementary and secondary schools—unlike Catholic colleges and universities—are typically affiliated with and operated by a parish or diocese, there is a strong probability that the schools involved in *Everson* and *Allen* were not separately incorporated as secular institutions. That is not true of the appellee colleges and universities in this case. Thus, the only proper conclusion that can be drawn from the Court's failure to rely on *Bradfield* in *Everson* and *Allen* is that *Bradfield* probably did not apply to the facts of those cases.

In fact, one decision has applied *Bradfield* to the precise question of whether a church-related school—Georgetown University—was a "sectarian" institution. *Speer* v. *Colbert,* 200 U.S. 130 (1906). Georgetown University was at that time, as it is today, operated under the auspices of members of the Society of Jesus, a religious order in the Roman Catholic Church.[51] The Court ruled that Georgetown University

> "was fully and completely incorporated by the above-cited act of Congress of June 10, 1844. *That act must be resorted to as the measure of the powers and duties, as well as to define the character, of the corporation created thereby. Bradfield* v. *Roberts,* 175 U.S. 291. *Taking the character of the college from the act of Congress, we are of the opinion that it is not a sectarian institution. . . .*" 200 U.S. at 143. (Emphasis added.)

It is clear, therefore, that *Bradfield* applies when the issue is—as stated in appellants' brief—whether an educational institution is to be deemed "sectarian" for Establishment Clause purposes.[52]

The inquiry mandated by *Bradfield* differs significantly from the tests of sectarianism proposed by

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[51] Appellee Fairfield University has an identical relationship to the Jesuit Order.

[52] Appellants also seek to distinguish *Bradfield* because the Court in that case stated that Providence Hospital did not limit its services to members of a single religious denomination. Appellants' Brief, p. 26. Appellants' assertion that church-related schools are not similarly open to persons of all religious faiths finds no support in the record of this case. Each of the appellee colleges and universities demonstrated affirmatively through evidence that they impose no religious restrictions on admission to the student body or employment on the faculty and staff. Appellants' contrary assertion is based solely on their so-called "composite profile" of a hypothetical "sectarian" college.

appellants.[53] Appellants have framed the basic factual issue in this case in terms of whether schools receiving Title I grants are religious institutions or are not religious institutions. *Bradfield* compels a far different emphasis. The underlying premise of *Bradfield* is that, when a religiously affiliated organization obtains a charter from the state to operate a hospital or a school, the law presumes it will carry out that activity in the same manner as non-church-related organizations which receive similar charters for identical purposes. Thus, in the context of this case, the search for "sectarianism" should be limited to determining whether church-related schools receiving Title I grants are fulfilling the educational functions for which they have been chartered in the states where they are located. If so, such schools will be considered bona fide educational institutions and not sectarian institutions as appellants allege. In a very real sense, therefore, the inquiry under *Bradfield* is "whether the educational function [of a church-related school] is distorted because of the institution's religious commitment."[54]

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[53] Appellants' brief does not make clear the precise test of sectarianism that they are advocating. Appellants seem to rely principally on their "composite profile" of a sectarian college. Appellants' Brief, pp. 10-11. But appellants also appear to be urging this Court to apply the criteria of sectarianism employed by the Maryland Court of Appeals in *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A.2d 51, *cert. denied, appeal dismissed*, 385 U.S. 97 (1966). In the court below, however, appellants relied exclusively on the *Horace Mann* criteria in developing their central legal theory.

[54] D. Giannella, *supra* note 20, at 588. The appellee colleges and universities suggested to the court below three factors that would reveal whether a church-related college's religious commitment distorted its educational functions. Those factors were (1) whether the school is accredited, (2) whether the school is open to persons of all religious faiths, or of no religious faith, and (3) whether

Consequently, *Bradfield* is the controlling precedent if the Court accepts appellants' invitation to decide the Establishment Clause issue in this case according to the alleged sectarian character of colleges and universities receiving Title I grants. And the evidence presented at the trial of this action established that none of the appellee colleges and universities are "sectarian" within the meaning of *Bradfield*.[55]

3. Child Benefit Theory

The *Everson* test propounded by appellants is absolutist in the prohibitions it imposes on government aid to church-related education. But the holdings in both *Everson* and *Allen,* are incompatible with any such absolute prohibitions, since both cases sustained spending programs that conferred tangible benefits on church-related education. Appellants, therefore, attempt to reconcile their *Everson* test with the holdings in *Everson* and *Allen* by recourse to the so-called "child-benefit" theory. See Appellants' Brief, pp. 19-20.

According to its proponents, the child-benefit theory marks the constitutional bounds imposed by the Estab-

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the school affords its students and faculty a full measure of academic freedom. The evidence at trial conclusively established that the appellee institutions were fully acquitting their educational functions under those criteria. See App. ¶¶ 33, 34, 37, 38, 41, 42, 45, 46, 49, 50, 53, 54, 58, 59, 62, 63, *infra*.

[55] All four appellee institutions have been incorporated as nonprofit, educational institutions, each by special act of the Connecticut Legislature under the authority of that State's general law governing nonstock corporations. Conn. Gen. Stat. Ann. tit. 32, ch. 600. See App. ¶¶ 32, 40, 48, 57, *infra*. Significantly, the appellee institutions were not incorporated under the special provisions of Connecticut law for ecclesiastical societies and church corporations. See Conn. Gen. Stat. Ann. tit. 32, ch. 598.

lishment Clause on public spending programs for education by reference to the recipient of the public funds. If the aid goes directly to the school child or his parents, the program will survive a constitutional challenge. But, if the public funds flow directly to a church-related school, the program is constitutionally defective under the child-benefit theory.[56] The child-benefit theory grows out of some language in both the *Everson* and *Allen* decisions. In *Everson,* the Court observed that "[t]he State contributes no money to the schools" under the challenged legislation "which does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U.S. at 18. In *Allen,* the Court stated that "no funds . . . are furnished to parochial schools." 392 U.S. at 243-44.

The federal spending scheme challenged in this case permits the government to make grants directly to church-related institutions of higher education. Thus, if the child-benefit theory is the measure of constitutional validity under the Establishment Clause, appellants must prevail in this case. But this Court's decisions, combined with a respect for Establishment Clause values, compel the conclusion that the child-benefit theory in no sense defines Establishment Clause limitations on permissible public assistance to the secular functions of church-related schools.

The child-benefit connotations of both *Everson* and *Allen* are explained quite simply by the legislative

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[56] See, *e.g.*, G. LaNoue, Public Funds for Parochial Schools? 15-22 (National Council of Churches, 1963); H. Jones, *The Constitutional Status of Public Funds for Church-Related Schools,* 6 J. Church & State 61 (1964).

schemes the Court was reviewing in those cases. In each instance, the legislature had structured the challenged program so that its financial benefits did in fact flow directly to the school child or his parents. Thus, in stating in both cases that no public funds were furnished to church-related schools, the Court was doing no more than reciting the facts of the cases it was deciding. To read those statements as articulating a rule of law that no public funds can be given directly to church-related schools is to attribute to the Court two exercises of judicial power it has repeatedly disclaimed. First, the Court would be deciding a question not presented by *Everson* and *Allen*, since in neither case did public funds flow directly to church-related schools. Secondly, the Court would be overruling *sub silentio* its earlier decision in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), in which a direct federal grant to a church-related institution was sustained.

The child-benefit theory also ignores the essential rationale for the *Allen* decision. For, after stating rather cryptically that no funds were furnished to church-related schools, the Court examined at length the dual nature of the education provided by church-related schools. 392 U.S. at 245-48. If the Court was concerned only with whether public funds flowed to the school child rather than the school, its lengthy analysis of the type of education provided by church-related schools was wholly unnecessary once the Court found that the statutory benefits flowed to school children and their parents.[57] The Court examined the educational program of church-related schools because it was the nature of the educational function sub-

[57] See W. Valente, *supra* note 27, at 593.

sidized—and not the identity of the recipient of the public funds—that was constitutionally controlling.

Perhaps the most serious defect in the child-benefit theory is the threat it poses to Establishment Clause values.[58] The child-benefit theory elevates the form of legislation over its substance and, in so doing, would permit a legislature to achieve what the Establishment Clause forbids. The logic of the child-benefit theory would compel the validation of a program providing full tuition from public funds for students attending church-related schools. But such a full tuition grant to those students would mean that tax-raised funds would subsidize the religious, as well as the secular, aspects of the curricula of church-related schools. However, *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), prohibits such tax support for religious instruction. The purpose and primary effect test, which limits public support to the secular educational functions of church-related schools, averts such a conflict with Establishment Clause values.

Consequently, the court below properly disposed of appellants' child-benefit argument when it commented: "[T]he child-benefit or indirect-direct aid approach would fashion an unacceptable test based on form rather than substance inasmuch as the 'constitutional result would depend upon minute distinctions and technicalities.'" J.A. 47. And the resultant "minute distinctions and technicalities" would do little to protect core Establishment Clause values.

4. Appellants' Version of the Purpose and Primary Effect Test

Appellants grudgingly concede that the purpose and primary effect test of *Schempp* and *Allen* might have

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[58] See J. Choper, *supra* note 27, at 313-18, 321.

a bearing on this litigation.[59] However, appellants then proceed to distort and misapply that controlling constitutional standard. There are two essential and demonstrable fallacies in appellants' purpose and primary effect analysis.

The first and probably most basic fallacy in that analysis is appellants' suggestion that the purpose and effect of a challenged enactment should be measured by the purpose and effect of institutions which benefit from it. That suggestion is simply in direct conflict with the precise formulation of the purpose and primary effect test. For, in both *Schempp* and *Allen*, the Court enunciated the test as follows: "[W]hat are the purpose and the primary effect *of the enactment*?" 392 U.S. at 243; 374 U.S. at 222 (emphasis supplied). The judicial concern is clearly with the purpose of the *legislature* and the primary effect of the *legislature's* actions. The educational processes in particular schools which benefit from such an enactment are simply an incidental facet of the central inquiry into legislative purpose and effect. Thus, a judicial inquiry that concentrated on the purpose and primary effect of those schools and their educational processes would clearly be misdirected.

Such a judicial inquiry would also be unworkable and unmanageable. For that inquiry would necessarily

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[59] Appellants misstate the position of the court below when they refer to the District Court's "assumption that the *Everson* test has been superseded by *Schempp*." Appellants' Brief, p. 30. The court below made no such assumption. That court simply recognized that *Everson's* "no tax" language did not state a constitutional test and that the controlling constitutional standard was contained in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), which applied the purpose and primary effect test to the precise question of public financial assistance to the secular functions of church-related schools. J.A. 44-51.

assume that the legislature was obligated to examine the purpose and effect of all schools that might participate in a spending program and to designate as qualified only those which, in their educational processes, did not advance or inhibit religion by design or result. Such a legislative inquiry would not be limited to church-related schools, for appellants' theory would also disqualify any school that *inhibited* religion. Since the effect of a school's educational process can be measured only according to the students it graduates, a legislature presumably could not act until it polled the graduates of all schools, church-related or otherwise, to determine whether the religious faith of those graduates had been strengthened or weakened by attendance at a particular school. The legislature would also have to satisfy itself that no participating school did anything in its curriculum or program to encourage or discourage religion. Simply to state these necessary by-products of appellants' purpose and primary effect analysis is to reveal the absurdity of that analysis.

Appellants' brief provides a more concrete demonstration of the clearly misdirected inquiry their analysis produces. Appellants attribute to Congress the impermissible purpose of advancing religion because, under the Higher Education Facilities Act, federal funds flow to institutions whose "dominant purpose . . . is to advance religion through propagation." Appellants' Brief, p. 33. But Congress did not manifest, in either the statute itself or the legislative background to the statute, any intent to aid church-related institutions because they are church-related. The manifested purpose is to expand enrollment capacity generally and as rapidly as possible by grants to qualified institutions which could most quickly and effectively provide for such expansion. Church-related institutions partici-

pate in the grant program only if (1) they satisfy religiously neutral eligibility requirements, (2) they demonstrate that the grant will result in an urgently needed expansion of enrollment capacity, and (3) they use the grant for solely secular purposes. It takes a fertile imagination to find a religious purpose in the provisions of the Higher Education Facilities Act or in the proceedings that led to its enactment.

The second fallacy of appellants' purpose and primary effect analysis is its factual predicates. In purporting to describe the purpose and effects of the educational processes of church-related colleges, appellants resort repeatedly to those characteristics of a so-called "sectarian" college contained in their "composite profile." As already shown, pp. 22-25, *supra*, that "composite profile" has absolutely no basis in the record of this case and bears no relationship to the dynamics and realities of church-related education. Yet appellants would have this Court apply the purpose and primary effect test on the basis of their own unsupported and unsupportable assumptions about church-related education.

A few examples will suffice. Appellants attribute an impermissible religious purpose to the Higher Education Facilities Act because funds under the statute go to schools whose "dominant purpose . . . is to advance religion through propagation." Appellants' Brief, p. 33. The evidence in this case, however, refutes any suggestion that the appellee colleges and universities exist for the purpose—dominant or otherwise—of *propagating* religion. Those institutions are not unique in that respect. For church-related colleges and universities are first and foremost educational institutions. Their church relationships simply add a

religious dimension of varying degrees to their total educational program.[60]

Appellants also make reference to "those churches which at great expense maintain sectarian colleges." Appellants' Brief, p. 33. But the record in this case fails to reveal any significant financial contribution by the sponsoring church—let alone any great expense by that church—to the appellee colleges and universities. One study of church-related higher education in this country found that, of 817 institutions surveyed, 26.2 per cent derived no income from the sponsoring church and 58 per cent received less than 10 per cent of their educational and general income from that source.[61] A rule of constitutional law based on the assumption that churches go to great expense to maintain colleges and universities would surely be ill-founded.

Finally, appellants assert that church-related schools "were organized and operated in pursuance of the church's religious endeavors; the teaching mission of the church refers to religious, not secular teaching." Appellants' Brief, p. 36.[62] That assertion is just a

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[60] See M. Pattillo and D. Mackenzie, Church-Sponsored Higher Education in the United States 76-101 (1966). Significantly, the authors concluded that the institutions they studied "are, by and large, stronger academically (in the secular sense) than they are religiously." *Id.* at 100.

[61] M. Pattillo and D. Mackenzie, *supra* note 60, at 43-47.

[62] The word "church" in the words quoted above seems to assume a monolithic force that pervades all of church-related education in this country. But the church-related colleges and universities in this country are affiliated with more than sixty different religious bodies. And those many sponsoring religious bodies reflect the great diversity of thought and belief that characterizes American religious life. See M. Pattillo and D. Mackenzie, *supra* note 60, at 20-26.

restatement of their plea to this Court to obliterate the distinction between secular education and religious instruction in church-related schools, a plea rejected in *Board of Education* v. *Allen,* 392 U.S. 236, 245-48 (1968). And the record in this case proves beyond all doubt that church-related educational institutions do in fact perform the separate and distinct functions of secular education and religious instruction.

Thus, unless the Court is willing to ground a constitutional principle on appellants' unsupported assumptions or to decide a hypothetical question, it could not rule for appellants even if it accepted their invitation to adjudge the validity of the Higher Education Facilities Act according to the purpose and effect of institutions receiving Title I grants.

5. Appellants' Application of the Walz Decision

Appellants read this Court's decision in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), as imposing an absolute Establishment Clause bar to any public spending program for education which results in "detailed" and "sustained" administrative relationships between public officials and church-related schools. *Walz* can be so read only if its reasoning is disregarded. For the Court expressly stated that the test of impermissible government involvement with religion "is inescapably one of degree." 397 U.S. at 674. It is only those administrative relationships that promote excessive or impermissible entanglement or involvement with religion and thus lead to governmental inhibition of religion, that are barred.

Appellants, however, eschew analysis, calling any administrative relationship the basis for invalidating the Higher Education Facilities Act. Such an argument

necessarily ignores the broad involvement of government in private education, including the church-related segment, that exists independent of public aid programs. The clearest examples involve compulsory attendance laws that impose strict requirements of curriculum content and quality on church-related elementary and secondary schools. This Court has found no constitutional defects in those laws despite the extensive government involvement with church-related education that results. See *Board of Education* v. *Allen*, 392 U.S. 236, 245-47 (1968); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925). Similar involvement between the state and church-related institutions exists in higher education. For example, under Connecticut law, the appellee colleges and universities could not offer a program of higher education or grant degrees until they were licensed and accredited by the State. Conn. Gen. Stat. Ann. § 10-330. The licensing and accrediting procedure involves close examination of an institution's "administration, finance, faculty, curricula, library, student admission and graduation, plant and equipment, records, catalogs, [and] program announcements." Conn. Gen. Stat. Ann. § 10-330(b). There have been no known challenges to those or similar state programs on Establishment Clause grounds. Yet they lead to a far greater governmental involvement with church-related educational institutions than the administration of the Higher Education Facilities Act.

Appellants' *Walz* argument contains the seeds of its own refutation. Appellants twice state that what *Walz* prohibits is "state involvement in *church* affairs." Appellants' Brief, pp. 41, 43. (Emphasis added.) But the federal and state officials responsible for administering the Act deal with educational insti-

tutions, not churches. Their concern is with educational activities, not church affairs. A school's church relationship does not convert that school into a church. Thus, the very forms of government involvement that appellants claim to be constitutionally disabling are lacking in this case.

Appellants also claim that the challenged statute will require public officials to police and monitor the classrooms of church-related schools. Appellants' Brief, pp. 42-43. No such requirement is imposed by the Higher Education Facilities Act, and the evidence presented at the trial of this action showed that no such monitoring or policing has resulted. In fact, such administrative action would appear to be precluded by the express terms of the statute. See 20 U.S.C. § 757. Rather, as this brief has shown, the administration of the Act rests on assurances from schools receiving Title I grants that they will make a solely secular use of the federal funds and the sound assumption that the schools will comply with those assurances. The administrative processes under the Act are carefully tailored to achieve a limited result—the use of federal funds for solely secular purposes.[63]

The involvement which *Walz* prohibits is that which leads to an inhibition of religion. Appellants have failed to demonstrate any such inhibition, either in the record of this case or in their speculative ruminations on where the administrative processes might lead. Public officials do not involve themselves in the re-

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[63] Even appellants concede that this Court's decisions require government to assure that limited use of public funds. Appellants' Brief, p. 42. But appellants then take the anomalous position that any administrative processes devised to achieve that result, no matter how narrow and limited those processes, will invalidate a spending program for education.

ligious functions of church-related schools. Those functions continue unabated. The only requirement imposed by the challenged statute is that church-related schools devote Title I facilities to their secular educational functions.[64] That restriction is constitutionally required and is one which church-related schools have willingly accepted and with which they have complied without a loss or diminution of their religious functions.[65]

6. The Alternative Means Test

Appellants have also suggested that the statute they challenge contravenes the Establishment Clause because it employs religion as a means to a secular end. See Appellants' Brief, pp. 46-48. They thus invoke the alternative means test which has found its fullest ex-

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[64] Appellants argue that it is "unrealistic even at the college level to create an island of secularity surrounded by a sea of sectarianism." Appellants' Brief, p. 39. That statement is simply another reflection of appellants' persistent refusal to recognize the secular-religious dichotomy in the functions of church-related schools, despite the record in this case and this Court's decision in *Board of Education* v. *Allen*, 392 U.S. 236, 245-48 (1968).

[65] Appellants' *Walz* argument also places substantial reliance on the opinion in *DiCenso* v. *Robinson*, Civ. No. 4239, U.S.D.C. Rhode Island (decided June 15, 1970). This Court's decision in *Walz* had a decisive impact on the result in *DiCenso*. Even a casual reading of the *DiCenso* opinion reveals two significant facts. First, that decision applied *Walz* to a very specific statutory and administrative scheme which bears no relationship to the administrative processes at issue in this case. In fact, the District Court in *DiCenso* conceded that the Higher Education Facilities Act would be constitutional under its *Walz* analysis. Secondly, the District Court in *DiCenso* misconstrued *Walz* in the same manner that appellants do in this case.

The *DiCenso* case has been appealed to this Court, Nos. 569 and 570, October Term, 1970, and those appeals will be the appropriate vehicle for evaluating the merits of that decision. In fact, until this Court disposes of those appeals, *DiCenso* has no precedential force or value.

pression in two concurring opinions by Mr. Justice Brennan. See *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 230, 294-95 (1963); *Walz* v. *Tax Commission,* 397 U.S. 664, 680 (1970). Mr. Justice Frankfurter also proposed a similar test in his separate opinion in *McGowan* v. *Maryland,* 366 U.S. 420, 462-63 (1961). Even if that alternative means test were the controlling constitutional standard, appellants' Establishment Clause claim would still fail.

In the first place, both Mr. Justice Brennan and Mr. Justice Frankfurter suggested that the alternative means test applied only in the context of legislative programs which generated primarily religious effects. As this brief has amply demonstrated, the primary effect of this statute is neither to advance nor inhibit religion and is therefore secular in nature. Consequently, even as formulated by Mr. Justice Brennan and Mr. Justice Frankfurter, the alternative means test would be inapplicable here.

Secondly, appellants' argument *assumes* that the federal government has employed religion as a means to a secular end. But the statutory scheme at issue in this case and the facts of this case refute that assumption. The federal government has chosen only a secular means—that is, financial assistance for the construction of academic facilities to be used for solely secular purposes—for the achievement of a demonstrably secular purpose. That church-related colleges and universities participate in the contested spending program does not convert that secular means into a religious means. Because of the secular-religious dichotomy in the curricula of church-related schools, the participation of those institutions in the Title I grant program is consistent with the government's use of a secular means to achieve its secular goals.

Finally, appellants misstate the legislative background of the statute when they claim that Congress could have achieved its secular goals without permitting church-related institutions to participate in the Title I grant program. Congress knew that church-related institutions of higher education constituted 40 per cent of all colleges and universities in this country and 60 per cent of all private colleges and universities when the challenged statute was enacted. Congress also knew that state colleges and universities were rapidly approaching the limits of their expansion capacity so that participation of church-related private colleges and universities was indispensable to the accommodation of the burgeoning student population. See p. 43, *supra*. Since only the secular educational functions performed by church-related institutions would be subsidized, Congress decided to draw upon the resources of such institutions while carefully avoiding any use of religion to achieve its results. The Establishment Clause simply does not prohibit the secular means employed by Congress to achieve its secular goals.

D. Conclusion

When a legislative program results in a confluence of government and religious interests, the Establishment Clause demands only that the enactment have a secular purpose and a primary effect that neither advances nor inhibits religion. That constitutional standard recognizes that it would be an idle and futile gesture to seek to relegate government and religious groups to wholly separate spheres of activity in our society, particularly when improving educational quality and expanding educational opportunities are at stake. The command of the Establishment Clause is that the government maintain a position of neutrality

when its interests and those of religious groups coincide. The purpose and primary effect test articulated and applied by this Court fully implements the command of neutrality and gives a full measure of protection to Establishment Clause values. Judged by that constitutional standard, the Higher Education Facilities Act of 1963 clearly passes constitutional muster.

III.

FREE EXERCISE CLAIM

The appellants contend that the Higher Education Facilities Act and the specific grants which they attack also run afoul of the Free Exercise Clause of the First Amendment. That claim is based on the allegation that the actions of the appellees, as well as the statute in question, "constitute compulsory taxation for religious purposes." Complaint ¶ 30, J.A. 14, 34. That claim warrants only brief discussion.

A virtually identical claim was made by the appellants in the *Allen* case. See Brief for Appellants, pp. 31-35, *Board of Education* v. *Allen,* 392 U.S. 236 (1968). The Court dismissed that claim in a single paragraph, observing that the appellants had "not contended that the New York law in any way coerces them as individuals in the practice of their religion." 392 U.S. at 249. That ruling was compelled by precedent. The Court had already held that a Free Exercise claim depends upon a showing of direct governmental pressure. See *Engel* v. *Vitale,* 370 U.S. 421, 430 (1962). The governmental pressures which the Free Exercise Clause prohibits are those which coerce a person to believe or disbelieve in a particular religion or in religion in general. *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961). Thus, in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 223 (1963), the Court declared

that "it is necessary in a free exercise case for one to show the coercive effect of the enactment *as it operates against him in the practice of his religion*. . . . [A] violation of the Free Exercise Clause is predicated on coercion." 374 U.S. at 223. (Emphasis added.)

The appellants here point to no governmental coercion operating against them in the practice of their religion. They allege compulsion in the taxing process and contend that the taxing process is being employed for religious purposes. But absent is any claim that those two factors affect the appellants in their religious practices or beliefs. Indeed, neither the complaint nor the proof at the trial revealed what religious beliefs, if any, are held by the appellants. See *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961). The parties stipulated at trial that the consciences of the appellants were offended by the use of compulsory taxation to raise the money necessary to finance the Title I grant program. See also Complaint ¶ 34, J.A. 14, 35. But that stipulation cannot overcome the inherent deficiencies of appellants' Free Exercise claim, for coerced or interdicted religious practices or beliefs—and not offended consciences—are the measure of a Free Exercise claim.

The allegation that government is engaging in "compulsory taxation for religious purposes" is a classic statement of an Establishment Clause claim, see *Flast* v. *Cohen*, 392 U.S. 83, 103 (1968), and appellants' Free Exercise claim is, therefore, no more than a restatement of their Establishment Clause claim. As a result, appellants' Free Exercise claim must fail for the same reasons that their Establishment Clause claim fails. Further, appellants allege that their free exercise of

religion has been infringed because the spending program they attack involves compulsory taxation "for religious purposes." But, as has been demonstrated at length above, the spending program challenged by the appellants has a strictly secular purpose. For these several reasons, the court below properly ruled that appellants' Free Exercise claim was totally without merit. J.A. 51-52.

CONCLUSION

For the several reasons stated above, appellants' constitutional claims are without merit and the judgment of the District Court should be affirmed.

October 5, 1970

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

[Excerpt From Proposed Findings of Fact Submitted by the Appellee Colleges and Universities to the District Court]

D. Character of the Defendant Colleges and Universities

[The proposed findings of fact set forth below concern the so-called religious or non-religious nature of the defendant colleges and universities. Those findings are relevant only if the Court adopts the plaintiffs' legal theory and decides the constitutionality of the challenged grants on the basis of whether the recipient institutions are religious or non-religious in nature.]

Fairfield University

32. Fairfield University, founded in 1941, is duly chartered and incorporated under the laws of the State of Connecticut and is authorized by its corporate charter to "establish, organize, maintain and conduct an institution for . . . undergraduate and graduate education in the State of Connecticut" and to "confer all such academic degrees as are usually given in colleges and universities." PX 80; DX F-1.* Under its charter and by-laws, the ultimate governing authority for the University is its Board of Trustees, and it is to the Board of Trustees that the University's President is accountable for his actions. Tr. 465.

33. Fairfield University is fully accredited by the New England Association of Colleges and Secondary Schools, the regional accrediting association which is responsible for the geographical area in which the University is located. Tr. 484; PX 82, p. 22; DX F-2, p. 24.

34. The defendant University presented evidence which established that it imposes no religious qualification for

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* The following citations are used in this Appendix: PX refers to appellants' exhibits at trial; DX refers to the exhibits of the appellee colleges and universities; and Tr. refers to the trial transcript.

membership on its Board of Trustees, employment on its faculty and staff, or admission to its student body. Tr. 468-70, 565-66. The University's Objectives expressly declare that "[i]t welcomes all persons regardless of . . . creed." PX 84, p. 7; PX 85, inside front cover. The University has on its faculty members of various religious faiths, Tr. 541-42, 548, 559-60, 576-77, and the defendant University presented evidence that no inquiry is made concerning an applicant's religious beliefs before he is hired for the faculty or staff. Tr. 541-42, 559-60, 565-66. The plaintiffs presented evidence that the University's student body and administrative staff is predominantly Catholic. Tr. 292-94, 501-02, 517-19. There was no evidence presented, however, to show that the large number of Catholics in the student body and on the administrative staff was the product of deliberate University policy. The Court finds, therefore, that Fairfield University is open to persons of all religious faiths and that no religious qualification is imposed for membership on the Board of Trustees, employment on the faculty and staff, or admission to the student body.

35. Although the defendant University provides its students with the opportunity to attend religious services regularly, PX 137, ¶ 1; PX 82, pp. 25-26; PX 91, pp. 5-6; DX F-2, pp. 27-28, the Court finds that there are no religious services at the University at which attendance by students is required by the University. Tr. 484.

36. The Court finds that the subjects taught at the defendant Fairfield University include the traditional subjects offered by a liberal arts college. Tr. 462-63; DX F-3, pp. 53-117. Among the several academic departments at the defendant University is a Department of Theology which offers students courses about religion. PX 137, ¶ 5. The Court finds that the courses offered in that department are taught as academic disciplines and no effort is made in those courses to indoctrinate students in or to proselytize and propagate the doctrines and teachings of the

Roman Catholic Church. Those findings are based on the following evidence:

a. The plaintiffs and the defendant University have stipulated that the courses taught in the Department of Theology "are taught according to the academic requirements of the subject matter and according to the instructor's concept of professional standards of sound and competent scholarship." PX 137, ¶ 6. The defendant University presented, through testimony, additional evidence that its Theology courses are taught as academic disciplines, Tr. 478-79, 537-38, 576, a concept which one witness defined as the opposite of indoctrinating students in the subject matter. Tr. 538.

b. The defendant University presented unchallenged testimony that no effort is made in the Theology courses to indoctrinate students in the tenets of any religious faith. Tr. 479, 577.

c. The defendant University presented uncontested evidence that it maintained a Department of Theology and offered courses about religion because such courses are considered to be a necessary part of a liberal arts education. Tr. 478, 577. The plaintiffs and defendant University stipulated that some non-church-related institutions of higher learning offer courses about religion, PX 137, ¶ 5, and additional evidence was presented at trial to show that the current trend among both public and private colleges is to add courses about religion to their curricula. Tr. 347, 606-09. Trinity College and Wesleyan University, two Connecticut schools which the plaintiffs view as constitutionally eligible to receive public funds, Complaint, ¶ 26, have Departments of Religion and offer a considerable number of courses about religion. DX DC-1, pp. 146-52; DX DC-2, pp. 157-58; DX DC-3.

d. The plaintiffs elicited testimony that courses about Roman Catholic dogma and doctrine play a "significant" part in the course offerings of the Theology Department.

Tr. 511-12. However, the parties stipulated that "[t]he courses in the Theology Department cover a range of human religious experiences and are not limited to courses about the Roman Catholic religion." PX 137, ¶ 5. The defendant University presented evidence that the courses offered and taught in the Theology Department cover all major religions and both Christian and non-Christian faiths. Tr. 575-76.

e. Catholic students at the defendant University are required to take two specified courses and two elective courses in the Theology Department. PX 137, ¶ 5.[10] Of the thirteen members of the Theology Department, eight are Jesuit priests, three are Catholic laymen, one is a Protestant minister and one is a rabbi. PX 137, ¶ 5. The rabbi teaches one of the courses required of all Catholic students. Tr. 534.

37. The Court finds, on the basis of uncontroverted evidence presented by the defendant University, that there is no effort made at the University to indoctrinate students in or to proselytize or propagate the tenets and doctrines of the Roman Catholic faith or of any other religious faith. Tr. 479, 507, 577, 581.[11]

38. The Court finds that the defendant University fosters an atmosphere of academic freedom. That finding is based on a consideration of the following evidence:

a. The University subscribes to the 1940 Statement of Principles on Academic Freedom and Tenure endorsed by

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[10] The Theology requirement will be reduced to two required courses in the 1970-1971 academic year. Tr. 577-78.

[11] One of the documents offered in evidence by the plaintiffs stated that it was the policy of the University "to prevent formal proselytizing in an area of religion contrary to that which the University represents." PX 89, p. 34. However, the plaintiffs presented no evidence to show that the University would condone proselytizing of that area of religion which the University represents—namely, Catholicism. And the evidence presented by the defendant University on that issue would refute any such implication. Tr. 479, 577.

the American Association of University Professors and the Association of American Colleges. Tr. 474-75; PX 89, p. 33; PX 137, ¶ 4; DX F-6.

b. The plaintiffs offered documentary evidence which reflected the defendant University's expectation that "no professor will attempt within his teaching to propound doctrines in such a way that they would be intended to persuade students to accept them by reason of the professor's authority or personal persuasion if such doctrines are in clear and direct violation of common Catholic teaching." PX 89, pp. 33-34. That same document recites that the contractual undertaking between the University and a professor provides that the contract can be terminated, *inter alia*, for "any grave offense against Catholic doctrine or morality." PX 89, p. 34; PX 140.

c. The defendant University presented uncontested testimony by faculty members and the University's President which established that the faculty enjoys "complete academic freedom," Tr. 474-75, 536, 560-61, 564-65, that no effort is made by members of the administration or department chairmen to censor or control the content of courses taught at the University, Tr. 475-77, 550-51, 564, and that there has been no instance in which there has been any effort to restrict what a faculty member may teach in the classroom. Tr. 476-77, 510.

d. Despite the statements contained in the document cited in subparagraph b, *supra*, faculty members who are not Catholic testified that they enjoyed full academic freedom and that no effort has been made to impose limitations on what they can teach, even when the content of their courses conflicts with Catholic doctrine. Tr. 536-37, 559-61.

39. The Court finds that defendant Fairfield University is a church-related institution of higher learning, PX 137, ¶ 1, and the church with which the relationship exists is the Roman Catholic Church. The Court further finds that the relationship exists not because of any control exercised

over the University or its affairs by the Roman Catholic Church or by any entity of that church, but because the University identifies itself in several of its publications as "Catholic" and "Jesuit" and because of the presence at the University of other physical manifestations of that church relationship. The bulk of the case presented by the plaintiffs with respect to defendant Fairfield University established the existence of the following physical manifestations of the church relationship:

a. Members of the Society of Jesus, a religious order within the Roman Catholic Church, serve on the University's governing board, administrative staff and faculty. Tr. 501-05, 517-19; PX 137, ¶ 1; DX F-2, pp. 10-22.

b. In its publications, the University identifies itself with "the Jesuit tradition of education." Tr. 505-08, 581-82; PX 82, p. 25.

c. Several of the buildings at the University campus are named after Jesuit saints. Tr. 497-99.

d. Some of the buildings at the campus contain religious symbolism, and some of the classrooms have crucifixes on the walls. Tr. 499-501.

e. The defendant University suspends classes on Roman Catholic holy days. DX F-2, pp. 8-9.

f. The University receives a financial benefit from the "contributed services" of the Jesuits who serve on its faculty and staff. Each such Jesuit is paid a salary according to his rank and years of service, and the total amount of the salaries earned by all Jesuits is credited to the Jesuit community at the University. The cost of the maintenance of the members of the community is deducted from that amount, and the balance is contributed back to the University. PX 137, ¶ 2. Aside from the "contributed services" of the Jesuits, the University receives no financial support from the Roman Catholic Church. Tr. 473.

g. The University schedules regular religious services on campus for its Catholic students. PX 82, pp. 25-26;

PX 91, pp. 5-6; DX F-2, pp. 27-28. While there have been non-Catholic religious services conducted on campus, there is no non-Catholic chapel available on campus for such services. Tr. 516. The University has a Catholic chaplain, a Protestant chaplain, a Jewish chaplain, and an Eastern Orthodox chaplain. Tr. 517; PX 82, p. 26.

h. Among the educational associations with which the University affiliates itself are the Jesuit Educational Association and the National Catholic Educational Association. DX F-2, p. 24.

Sacred Heart University

40. Defendant Sacred Heart University, founded in 1963, is duly chartered and incorporated under the laws of the State of Connecticut and is authorized by its corporate charter to "establish, organize, maintain and conduct an institution for . . . undergraduate education in the State of Connecticut" and to "confer all such academic degrees as are usually given in colleges and universities." Tr. 342-43; PX 97; PX 99. The ultimate governing authority for the defendant University is its Board of Trustees. Tr. 351.

41. At the time of the trial of this action, the defendant University was a recognized candidate for accreditation by the New England Association of Colleges and Secondary Schools, the regional accrediting association which is responsible for the geographical area in which the University is located. Tr. 331-32; PX 101, p. 5; PX 115, p. 5; DX SH-2, p. 5. Candidacy for accreditation is the step immediately preceding the status of full accreditation. Tr. 331-32.[12]

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[12] The defendant University represents to the Court, and will request permission to insert into the record at the time of the closing arguments, the fact that it was granted full accreditation by the New England Association of Colleges and Secondary Schools on December 5, 1969, the day on which the trial of this action ended.

42. The Court finds that the defendant University is open to persons of all religious faiths and imposes no religious qualification as a condition for employment on its faculty and staff or for admission to its student body. That finding is based on a consideration of the following evidence:

a. The University's President, Dr. Conley, testified that no religious qualification is imposed for employment on the faculty and staff or for admission to the student body, that the faculty and student body contains persons of all religious faiths, that he has the ultimate authority for hiring members of the faculty and that he does not take account of an applicant's religious beliefs in the hiring process. Tr. 349-50.

b. The plaintiffs offered in evidence a copy of the University's faculty application form which asks the applicant's religious preference. PX 103. However, not all members of the faculty complete the application form before they are hired. Tr. 373-74; PX 114, pp. 66-69. Further, a non-Catholic member of the faculty testified that, when she was interviewed for employment, she was not asked her religious persuasion. When she volunteered that she was not a Catholic, she was told that fact was irrelevant. Tr. 594.

c. The defendant University holds itself out to the public as "open to qualified students of all denominations." PX 101, inside front cover. The plaintiffs offered in evidence a copy of the University's Application for Admission form, which asks an applicant's religious preference. PX 95. There is evidence, however, that the responses to that question are used to seek a greater religious diversity in the student body. PX 114, pp. 16-17, 19-20. Approximately 80 per cent of the student body is Catholic. PX 114, p. 17.

43. Although the defendant University provides its students with the opportunity to attend religious services

regularly, PX 138, ¶ 1; PX 101, p. 9; PX 106, p. 6; PX 108, p. 14, the Court finds that there are no religious services at the University at which attendance by students is required by the University. Tr. 356.

44. The Court finds that the courses taught at the defendant Sacred Heart University are those which are normally offered at colleges offering a Bachelor of Arts degree. Tr. 343-44; DX SH-2, pp. 47-72. Among the several academic departments at the defendant University is a Department of Religious Studies which offers students courses about religion. PX 138, ¶ 5. The Court finds that the courses offered in that department are taught as academic disciplines and no effort is made in those courses to indoctrinate students in or to proselytize and propagate the doctrines and teachings of the Roman Catholic Church. Those findings are based on a consideration of the following evidence:

a. Plaintiffs and the defendant University have stipulated that the courses taught in the Department of Religious Studies "are taught according to the academic requirements of the subject matter and according to the instructor's concept of professional standards of sound and competent scholarship." PX 138, ¶ 6. The defendant University presented, through testimony, additional evidence that its Religious Studies courses are taught as academic disciplines. Tr. 346, 527, 602.

b. The defendant University presented unchallenged testimony that no effort is made in the Religious Studies couses to indoctrinate students in the tenets of any religious faith. Tr. 372, 528, 602.

c. Two courses in the Religious Studies Department are required of all students at the University. Tr. 605-06; PX 114, pp. 40-45; PX 138, ¶ 5. One of the required introductory courses is taught by a rabbi, who is a member of the Religious Studies Department. Tr. 526-27, 601-02.

d. The plaintiffs and the defendant University stipulated that the courses taught in the Religious Studies Department "cover a range of human religious experiences and are not limited to courses about the Roman Catholic religion." Tr. 602-03; PX 138, ¶ 5. Additional evidence was presented to support that fact. Tr. 346-47; DX SH-2, pp. 68-69.

e. Additional evidence was presented at trial to show the current trend among both public and private colleges is to add courses about religion to their curricula. Tr. 347, 606-09. Trinity College and Wesleyan University, two Connecticut schools which the plaintiffs view as constitutionally eligible to receive public funds, Complaint, ¶ 26, have Departments of Religion and offer a considerable number of courses about religion. DX DC-1, pp. 146-52; DX DC-2, pp. 157-58; DX DC-3.

45. The Court finds, on the basis of uncontroverted evidence presented by the defendant University, that there is no effort made to indoctrinate students in or to proselytize or propagate the tenets and doctrines of the Roman Catholic faith or of any other religious faith. Tr. 353, 372, 528, 602, 604.

46. The plaintiffs and defendant University have stipulated that the defendant University has adopted the 1940 Statement of Principles on Academic Freedom and Tenure, as approved by the American Association of University Professors and the Association of American Colleges, as its official policy on matters of academic freedom and tenure. PX 138, ¶ 4. The Court finds, on the basis of uncontroverted evidence, that the faculty and students at the defendant University enjoy complete and unhindered academic freedom. Tr. 353-54, 372, 527-30, 594-95, 598-600, 604, 613; PX 114, pp. 35-37; DX SH-3, p. 13; DX SH-4, p.22.

47. The Court finds that the defendant Sacred Heart University is a church-related institution of higher learn-

ing, PX 37, ¶ 1, and the church with which the relationship exists is the Roman Catholic Church. The Court further finds that the relationship exists not because of any control exercised over the University or its affairs by the Roman Catholic Church or by any entity of that church, but because the University identifies itself in several of its publications with the philosophy of Catholic education and because of the presence at the University of other physical manifestations of that church relationship. The bulk of the case presented by the plaintiffs with respect to defendant Sacred Heart University established the existence of the following physical manifestations of the church relationship:

a. The University has described itself in some of its publications as "The Roman Catholic Diocesan Commuter Co-Educational University." Tr. 376; PX 115; PX 116; PX 117; PX 118; PX 119; PX 120; PX 121.

b. The Chairman of the University's twelve-member Board of Trustees is the Most Reverend Walter W. Curtis, Bishop of the Roman Catholic Diocese of Bridgeport and the person who provided the impetus for the founding of Sacred Heart University. DX SH-2, pp. 4, 17. Two of the other members of the Board are Roman Catholic priests, and there is one vacancy on the Board due to the recent death of a priest. The remaining eight members of the Board are laymen. Tr. 351-52.

c. Teachers at the University are permitted to recite prayers in their classrooms if they wish. Tr. 360-61, 370-72.

d. The University has a Catholic chapel, at which are conducted regular religious services for Catholic students. PX 106, p. 6. Although there have been non-Catholic religious services conducted on campus, there is no chapel available for such services. Tr. 591-92.

e. Some of the classrooms at the defendant University have had crucifixes on the walls. Tr. 600.

f. The defendant University identifies itself in its Statement of Objectives with "the philosophy of Christian education in twentieth century America." Tr. 367-70; PX 115, p. 16. One source of the philosophy of education articulated in the University's Objectives is the Encyclical on the Christian Education of Youth by Pope Pius XI and the documents of Vatican II. Tr. 339-41.

g. The defendant University suspends classes on Roman Catholic holy days. DX SH-2, pp. 15-16; PX 115, pp. 6-7.

h. Although the University receives none of its current operating funds from church sources and it has received no gifts from church sources, it received advances in the amount of $301,132.15 from the Diocese of Bridgeport during the early years of the University's existence. In addition, the University owes the Diocese an additional $46,440.00 for a note taken by the Diocese at the time that the University purchased the land occupied by the Library building. That note covered the total purchase price of the land. The Diocese owns the land and facilities utilized by the University. The land and facilities have been leased to the University for a thirty-year term. The lease agreement provides for an annual rental of $1 per year for the first ten years, with a provision for renegotiation of the annual rental at the end of ten years. PX 138, ¶ 3.

Albertus Magnus College

48. Albertus Magnus College, founded in 1925, is duly chartered and incorporated under the laws of the State of Connecticut and is authorized by its incorporating act to "establish, organize, maintain and conduct an institution for the higher education of women" and to "confer such academic and honorary degrees and diplomas as are usually given in colleges." DX AM-1. The control and management of the affairs of the College are vested in its Board of Trustees, DX AM-1, and that Board is the group to which the President of the College is responsible. Tr. 626.

49. Albertus Magnus College is fully accredited by the New England Association of Colleges and Secondary Schools, the regional accrediting association which is responsible for the geographical area in which the College is located. Tr. 651-52; PX 42, p. 9; DX AM-4, p. 8.

50. The defendant College presented evidence which established that it imposes no religious qualification for membership on its faculty and staff or for admission to its student body. Tr. 633, 635-36. The College has on its faculty members of various religious faiths, Tr. 650, 695-96, 704; PX 55, pp. 19-20, and the defendant College presented evidence that no inquiry is made concerning an applicant's religious beliefs before he is hired for the faculty or staff, Tr. 633, 695-96, 704,[13] or before she is admitted to the student body. Tr. 635-36. The plaintiffs elicited testimony that the College's student body is predominantly Catholic. Tr. 690. There was no evidence presented, however, to show that the large number of Catholics in the student body was the product of deliberate College policy. The Court finds, therefore, that Albertus Magnus College is open to persons of all religious faiths and that no religious qualification is imposed for employment on the faculty and staff or admission to the student body.

51. Although the defendant College provides its students with the opportunity to attend religious services regularly, PX 42, pp. 15-16, the Court finds that there are no religious

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[13] The plaintiffs elicited testimony that, until three or four years ago, the faculty application form employed by the defendant College asked an applicant's religious preference. Tr. 671-73; PX 55, p. 19. However, there was no evidence presented to show that the response to that question was used in the decision to hire or not hire a particular applicant. In fact, two witnesses who were hired when the application form in question was being used testified that they had not been questioned concerning their religious beliefs when they were hired. Tr. 695-96, 704.

services at the College at which attendance by students is required by the College. Tr. 685-87.[14]

52. The Court finds that the defendant Albertus Magnus College, as a liberal arts school, offers its students courses in fifteen departments. Tr. 625, 630; PX 42, pp. 37-72. The plaintiffs and the defendant College have stipulated that among the several academic departments at the College is a Department of Religious Studies which offers courses about religion, that the courses in the Religious Studies Department cover a range of human religious experiences and are not limited to courses about the Roman Catholic religion, that the current policy of the College is to require Catholic students to take two specified courses in the Religious Studies Department, and that the courses in that department are taught by two Roman Catholic priests and a rabbi. PX 131, ¶ 4. The plaintiffs and the defendant College further stipulated that the courses in the Religious Studies Department are taught according to the academic requirements of the subject matter and according to the instructor's concept of professional standards of sound and competent scholarship. PX 131, ¶ 5. The defendant College presented uncontroverted testimony that there is no effort made at the College to inculcate students in or to proselytize Catholic doctrine. Tr. 657, 714. Therefore, the Court finds that the courses taught in the Department of Religious Studies at the defendant College are not employed for the purpose of propagating the tenets and doctrines of the Roman Catholic faith.

53. The defendant College presented evidence that there is no effort made at the College to indoctrinate students with or to proselytize or propagate the tenets and doctrines

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[14] The defendant College's 1965 Catalog, offered in evidence by the plaintiffs, states that "[a]ll Catholic students are required to make the annual retreat." PX 139, p. 15. However, no evidence was produced to explain the nature of the "annual retreat." Further, the next edition of the College's catalog stated that "[r]etreats are voluntary." PX 42, p. 15.

of the Roman Catholic faith. Tr. 657, 714. A document offered in evidence by the plaintiffs described as one of the purposes of the College to "instill Catholic ideals," and described the College as "a Catholic institution committed to the inculcation of Christian faith and morality." PX 39, pp. 9, 13. However, the defendant College presented evidence that the portion of that document containing the latter quotation had never been given force or effect at the College. Tr. 653-54. Therefore, the Court finds that there is no effort made at the College to indoctrinate students in or to proselytize or propagate the tenets and doctrines of the Roman Catholic faith.

54. The Court finds that the defendant Albertus Magnus College affords the members of its faculty a full measure of academic freedom. That finding is based upon a consideration of the following evidence:

a. The plaintiffs and the defendant College have stipulated that the College has adopted as its official policy statement on academic freedom the 1940 Statement of Principles on Academic Freedom and Tenure, as adopted by the American Association of University Professors and the Association of American Colleges. PX 131, ¶ 3.

b. The defendant College presented uncontested testimony that no effort is made by the College to restrict the content of courses taught there, that there is no subject matter which cannot properly be taught at the College, that faculty members have enjoyed "complete academic freedom" and that the academic freedom existing at the College compares favorably with that existing at other institutions of higher learning. Tr. 636-37, 653-54, 696-99, 704-06, 709-12.

c. The plaintiffs and the defendant College have stipulated that all courses offered and taught at the College are taught according to the academic requirements of the subject matter and according to the instructor's concept of

professional standards of sound and competent scholarship. PX 131, ¶ 5.

d. The plaintiffs offered in evidence a document which, in purporting to state the College's policy on academic freedom, provided that a faculty member "is not free to disseminate doctrines and views that are subversive . . . of the aims and purposes of the College as a Catholic institution committed to the inculcation of Christian faith and morality." PX 39, p. 13. However, the defendant College presented evidence that the academic freedom provision has never been in force or operation and that the College, since 1957, has "followed substantially" the 1940 Statement of Principles referred to in subparagraph a above. Tr. 633, 654-56, 709-12. Further, the academic freedom provision of PX 39 has been superceded by a provision in the Faculty Constitution, DX AM-3, pp. 1-2, which adopts verbatim the 1940 Statement of Principles referred to above.

55. The Court finds that defendant Albertus Magnus College is a church-related institution of higher learning, PX 131, ¶ 1, and that the church with which the relationship exists is the Roman Catholic Church. The Court further finds that the relationship exists not because of any control exercised over the College or its affairs by the Roman Catholic Church or by any entity of that church, but because the College identifies itself in several of its publications as "Catholic" and because of the presence at the College of other physical manifestations of the church relationship. The bulk of the case presented by the plaintiffs with respect to defendant Albertus Magnus College established the existence of the following physical manifestations of the church relationship:

a. Members of the Dominican Sisters of Saint Mary of the Springs founded the College and have, from its inception, served on the College's Board of Trustees and its faculty and administrative staff. Tr. 664-67; DX AM-4, p. 5; PX 42, pp. 76-81; PX 139, pp. 72-76.

b. Some of the names of the buildings at the College's campus have significance in the Roman Catholic religion. Tr. 661-64.

c. Some of the building and classrooms on campus contain religious symbols, such as crucifixes. Tr. 692-93.

d. Catholic religious services are conducted regularly on campus. Tr. 685-87; PX 42, pp. 15-16.

e. There are two Catholic chapels at the campus of the defendant College, but there are no non-Catholic chapels. Tr. 684.

f. The defendant College suspends classes on Roman Catholic holy days. PX 42, pp. 86-87; DX AM-4, p. 95.

56. The Court finds that the defendant College receives no financial support from the Catholic Church, the local Diocese or from the Dominican Sisters of Saint Mary of the Springs. Tr. 631-32, 651.

Annhurst College

57. Annhurst College, founded in 1943, is duly chartered and incorporated under the laws of the State of Connecticut and is authorized by its incorporating act to "establish, organize, maintain and conduct an institution for the education of women in the various departments of higher education" and to "confer such academic degrees, provided the curriculum and character of work of said college shall be approved by the state board of education, and grant such diplomas or certificates as are customary in institutions of education." PX 56; Tr. 731. The Board of Trustees is the governing body of the College and is the body to which the College's President is responsible for her actions as President. Tr. 717.

58. Defendant Annhurst College is fully accredited by the New England Association of Colleges and Secondary Schools, the regional accrediting association which is re-

sponsible for the geographical area in which the College is located. Tr. 731; PX 59, inside front cover; DX A-1, inside front cover.

59. Defendant Annhurst College presented evidence that it imposes no religious qualification as a condition to employment on its faculty and staff or to admission to its student body. Tr. 719, 762-63, 771. The plaintiffs offered in evidence the College's Application for Admission form, which asks the religious preference of the applicant and her parents. PX 70. The plaintiffs also elicited testimony that 95 per cent of the student body is Catholic and that of 25 lay persons on the faculty, approximately 15 are Catholic. Tr. 731. However, no evidence was presented to show that the high percentages of Catholics in the student body is the result of deliberate College policy or of the answers to the questions concerning religious preference on the Application for Admission form. Further, the defendant College presented uncontested evidence that an applicant's religious beliefs play no role in the faculty hiring process. Tr. 762-63, 771. Therefore, the Court finds that, despite the high percentage of Catholics in the student body, there is no religious qualification imposed by defendant Annhurst College as a condition to employment on its faculty and staff or to admission to its student body.

60. Although the defendant Annhurst College provides its students with an opportunity to attend religious services regularly, Tr. 743-44; PX 59, p. 7; DX A-1, p. 7, the Court finds that there are no religious services at the College at which attendance by students is required by the College. Tr. 726.[15]

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[15] The President of the defendant College testified during the course of her deposition that there was an "unconscious effort" made to encourage students to attend Catholic religious services. PX 79, pp. 45-46. However, she disclaimed that statement during her testimony at the trial of this action. Tr. 740-41.

61. The Court finds that defendant Annhurst College offers its students a variety of courses typically offered at a liberal arts college. Tr. 717, 718; PX 59, pp. 31-65. Among the several academic departments at the defendant Annhurst College is a Department of Theology which offers students courses about religion. PX 129, ¶ 3. The Court finds that the courses offered in that department are taught as academic disciplines and that no effort is made in those courses to indoctrinate students in or to proselytize and propagate the doctrines and teachings of the Roman Catholic Church. Those findings are based on a consideration of the following evidence:

a. The plaintiffs and the defendant College have stipulated that all courses offered and taught at the College, including those in the Department of Theology, are taught according to the academic requirements of the subject matter and according to the instructor's concept of professional standards of sound and competent scholarship. PX 129, ¶ 4.

b. The defendant College presented testimony that the courses in the Department of Theology are taught as academic disciplines and that no effort is made in those courses to inculcate or indoctrinate students with the teachings of the Roman Catholic Church. Tr. 726. The plaintiffs did not directly challenge or contest that testimony.

c. The plaintiffs elicited testimony that Catholic students, and only Catholic students, are required to take twelve credits in Theology to graduate, Tr. 745-47, that the bulk of the courses offered in the Theology Department focus on Roman Catholic doctrine, Tr. 747-48, and that all of the courses offered in the Theology Department are taught by two Roman Catholic priests. Tr. 748.

62. The Court finds that there is no effort made at the defendant Annhurst College to indoctrinate students in or

to proselytize or propagate the tenets and doctrines of the Roman Catholic Church. Tr. 726, 727-28, 768.[16]

63. The Court finds that the defendant Annhurst College affords its faculty a full measure of academic freedom. That finding is based on a consideration of the following evidence:

a. The plaintiffs and the defendant College stipulated that all courses offered and taught at the College are taught according to the academic requirements of the subject matter and according to the instructor's concept of professional standards of sound and competent scholarship. PX 129, ¶ 4.

b. The defendant College presented additional evidence that faculty members may teach what they wish in the classroom without administration supervision, Tr. 726-27, 764, 770-771, that there has been no effort made to prevent the teaching of subject matter which is contrary to Catholic doctrine, Tr. 727-28, that the 1940 Statement of Principles on Academic Freedom and Tenure, as approved by the American Association of University Professors and the Association of American Colleges, has been observed by the College during the tenure of its current President, Tr. 728, and that the College's current President is merely continuing the pattern of academic freedom which she found to exist at the College when she assumed her duties. Tr. 728.

c. The plaintiffs offered in evidence a document which recites that a faculty member at the defendant College "is not free to disseminate doctrines and views that are subversive of . . . the aims and purposes of the College as a

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[16] The plaintiffs offered in evidence a document which described the defendant College as "a Catholic institution committed to the inculcation of Catholic faith and morality." PX 129, p. 5. However, the President of the defendant College testified that that provision of the document had not been in force since she assumed her position in 1965. Tr. 727.

Catholic institution committed to the inculcation of Christian faith and morality." PX 129, p. 4. The plaintiffs also elicited testimony that PX 129 is the only operative and official document of the defendant College which contains any statement on academic freedom. Tr. 752-53.

d. The defendant College presented testimony that the academic freedom statement of PX 129 has had no force or effect during the tenure of the current President of the College, Tr. 727, and that faculty members at the College have enjoyed unhindered academic freedom despite the quoted provision of PX 129. Tr. 763-65, 770-72.

64. The Court finds that the defendant Annhurst College is a church-related institution of higher learning, PX 129, ¶ 1, and that the church with which the relationship exists is the Roman Catholic Church. The Court further finds that the relationship exists not because of any control exercised over the College or its affairs by the Roman Catholic Church or by any entity of that church, but because the College identifies itself as "Catholic" in several of its publications and because of the presence at the College of other physical manifestations of that church relationship. The bulk of the case presented by the plaintiffs with respect to defendant Annhurst College established the existence of the following physical manifestations of the church relationship:

a. From the inception of the defendant College, members of the Daughters of the Holy Spirit, a religious order within the Roman Catholic Church, have served on the College's governing board, administrative staff and faculty. Tr. 734-39; PX 59, 67-75.

b. Publications of the defendant College describe it as a "Catholic liberal arts college for women" and state that it is "conducted by the Daughters of the Holy Ghost." Tr. 739-40.

c. The Daughters of the Holy Spirit provided the initial capital funds to initiate the defendant College, and the

College has received one gift from the Roman Catholic Diocese of Norwich. Tr. 748. However, the College receives no regular financial support from the religious order or from other Catholic Church sources. Tr. 728-29.

d. The Sisters and priests on the faculty wear their religious garb while teaching classes at the College. Tr. 749.

e. The defendant College suspends classes on Roman Catholic holy days. Tr. 750.

f. The College has a Catholic chaplain and provides regular Catholic religious services on campus. Tr. 743-44. The College has no non-Catholic chaplains and provides no non-Catholic religious services on campus. Tr. 745.

g. Among the campus student organizations are two Catholic honorary societies. Tr. 744-45.

h. A Catholic chapel is located in one of the dormitories and all dormitory rooms have crucifixes on the walls. Tr. 732-33.